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ERRATA.

PAGE.	LINE.	
133	9	*for* Subordinate *read* District.
,,	15	,, ,, ,, ,,
146	25	*omit* brother.
149	6	*for* on the name *read* in the name.
156	21 & 22	Transpose these two lines.
165	14	*for* within the excluded *read* with the excluded.
184	37	*for* discussions *read* discussion.
187	22	*for* reason *read* reasons.
189	29	*omit* in.
[209	*Note.*	C. R. P. No. 554 of 1925 is reported as 51 M. L. J. 60.]
215	21	In not a suit relating, *omit* not.
221	39	*for* can *read* cannot.
226	39	*for* Courts (second word) *read* Court.
231	39	*for* contest *read* context.
255	12	*for* assignee *read* assignor.
316	9	*for* full stop *insert* comma after "tation".
,,		*for* The *read* the (without a capital).
,,		Insert a full stop after "barred".
426	25	*omit* in.
560	23	*for* S. 89 *read* R. 89.
563		Headnote (Per *Waller, J.*) *for* having a pretending *read* having or pretending.
708	2nd line from bottom	*for* 1911 *read* 1901.
,,	33	*for* after the period of 7 years and 8 months expired *read* at the expiry of 6 years.
741		*omit* line 8.
,,	10	*After* Judge *read* it is vested in him.
742	12	*After* Councillor, *read* who.
792	In 2nd para of the headnote,	*omit* the words beginning "irrespective of" etc.
881	21	*for* S. 11 (4) *read* S. 3 (4).

ADDENDUM.

Note.—The decision in 51 M. L. J. 788 (P. C.) has since been abrogated with retrospective effect by Act II of 1927.

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THE LAW OF OCCUPANCY RIGHT IN THE CASE OF INAMS.

A HISTORICAL SKETCH.

It is proposed in the course of this short sketch to trace in broad outline the currents and cross-currents of judicial opinion that have been till now witnessed in regard to the vexed question of occupancy rights in the case of inams and to indicate the widely divergent views that have been expressed from time to time. The dispute has principally centred round the onus of proof in cases of suits in ejectment by inamdars against their cultivating ryots and this question again has turned upon the presumption of law, if there is one, in respect of the nature and scope of inam grants. The view that undoubtedly prevailed among the early legislators and administrators was that inams were mostly, if not always, grants of the revenue and not grants of the soil. In Regulation IV of 1831 and in Acts XXXI of 1836 and XXXIII of 1838 which extended the operation of that regulation, inams were described as hereditary or personal grants of land revenue. It is not necessary to refer here to the object with which that Regulation and those Acts were passed or to trace how the failure of these and other measures finally culminated in the establishment of the Inam Commission in 1858. It is enough to say that the change in the administrative policy of the Government in regard to inams which was signified by the establishment of the Inam Commission and by the enfranchisement proceedings which were started by the Inam Commissioner did not in any way affect or alter the views which were till then prevalent regarding the nature of inam grants. In the preamble to the Enfranchised Inams Act [Madras Act IV of

1862] which was the outcome of the Inam Rules and the Inam Settlement, (this part of the preamble is now repealed) inams were referred to as hereditary and personal grants of land revenue though lower down in the same preamble reference is made to "the inam lands being thus enfranchised."

Section 4 of the Pensions Act (Act XXIII of 1871) similarly enacted that no Civil Court shall entertain any suit relating to any pension or grant of money or *land revenue* conferred or made by the British or any former Government, while S. 7 exempted from its operation any inam of the class referred to in Madras Act IV of 1862. The expressions 'inam' and 'grant of revenue' were obviously used as synonymous. [*Per curiam* in *Rama* v. *Subba* (1)].

From the following passage from the proceedings of the Board of Revenue, dated 5th January, 1818, it would be clear that they regarded inamdars as being just in the same position as zamindars, that is to say, as merely the assignees of the Government's right to land revenue. Referring to the cultivating ryots of Southern India, the Board said :—

"The universally distinguishing character as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil so long as they render a certain portion of the produce of the land, in kind or money as public revenue; and whether rendered in service, in money, or in kind, and whether paid to rajas, jaghirdars, zamindars, poligars, moothadars, shrotriyamdars, inamdars, or Government officers, such as tahsildars, amildars, amins, or tannadars, the payments which have always been made by the ryots are universally termed and considered the dues of the Government."

This question about the presumption in regard to the scope of inam grants first came up for consideration before the Bombay High Court and it was only after the rule was well settled there that a similar rule came to be adopted in Madras. Though the Bombay Court was earlier in laying down a working rule or presumption for cases in which the scope of an inam grant came in question, the distinction between a grant of the freehold of the land and a grant of the land revenue was a well-known one from the earliest times both in Madras and in Bombay and it was referred to in innumerable cases both in the Bombay and in the Madras High Courts. The distinction was a material one not only for the purpose of deciding disputes as to occupancy rights between inamdars and their ryots, the class of cases with which we are all familiar but also and especially in the earlier cases, for the purpose of deciding

1. (1888) I L R 12 M 98.

questions of jurisdiction arising under the Pensions Act which applied only to grants of land revenue. *See*, for instance, *Naro Damodar* v. *The Collector of Poona* (2), *Panchanadayyan* v. *Nilakandayyan* (3) and *Rama* v. *Subba* (1)].

The leading case which for the first time enunciated the rule that inam grants are mostly grants of land revenue was *Krishna Rao* v. *Ranga Rao* (4) in which the judgment was delivered by Westropp, C. J. To quote His Lordship's judgment—

> "Sanadi grants in inam, saranjam, jaghir, etc., are generally speaking, more properly described as alienations of the royal share in the produce of the land, *i. e.*, of land revenue, than grants of land, although in popular parlance occasionally so called."

In *Ravjinarayan Mandlik* v. *Dadaji Bapuji Desai* (5) his Lordship while fully adhering to the above statement in *Krishna Rao* v. *Ranga Rao* (4) added that "it is not true that such is invariably the case" a qualification which one would have thought was clearly implied in the previous judgment itself. The rule thus enunciated was repeatedly applied in the Bombay High Court in innumerable cases [vide *Vaman Janardhan* v. *The Collector of Thana* (6), *Ramchandra* v. *Venkat Rao* (7), *Kesav Rao* v. *Ganpat Rao* (8), *Ramkrishna Rao* v. *Nana Rao* (9), *Rajya* v. *Balkrishna* (10), *Balwant Ramchandra* v. *Secretary of State for India* (11),] and so recently as *Guru Rao* v. *Secretary of State for India* (12) a case to which reference will have to be made again later. The reason of the rule was explained in *Babaji* v. *Nanaji* (13), *Desai* v. *Bhavabhai* (14) and *Nawab Mir Kamaludin* v. *Partap Mota* (15) to be that a grant of a village by the Government whether native or British can only be subject to all existing rights against the Government, the most important of such rights being the right of permanent occupancy which cultivators had in their holdings in the great majority of instances.

This discussion, however, arose in an acute form in Madras only after the passing of the Madras Estates Land Act though we find in some at any rate of the earlier cases a

1. (1888) I L R 12 M 98.
2. (1877) I L R 6 B 209.
3. (1883) I L R 7 M 191.
4. (1867) 4 B H C R (A C J) 1.
5. (1875) I L R 1 B 523.
6. (1869) 6 B H C R 191.
7. (1882) I L R 6 B 598.
8. (1891) I L R 16 B 596.
9. (1903) 5 Bom L R 983.
10. (1905) I L R 29 B 415.
11. (1905) I L R 29 B 480.
12. (1916) I L R 41 B 408.
13. (1879) I L R 3 B 340 at 342.
14. (1880) I L R 4 B 643.
15. (1880) I L R 6 B 244 at 250.

passing reference to it. The two earliest cases which related to inamdars and their ryots [*Achayya* v. *Hanumantarayudu* (16) and *Venkatacharlu* v. *Kandappa* (17)] laid down conflicting rules as to onus of proof. In *Achayya* v. *Hanumantarayudu* (16) it was held "that the onus of proving occupancy right rested" on the cultivating ryot while it was laid down in *Venkatacharlu* v. *Kandappa* (17) that "it was for plaintiff to show that under the terms of the tenancy and in the circumstances that exist, he has a right to eject the defendant" and again that "when the plaintiff does not prove what the terms of the tenancy are, he cannot eject although defendant may fail to prove his right of occupancy." No doubt the learned Judges in *Venkatacharlu* v. *Kandappa* (17) say that *Achayya* v. *Hanumantarayudu* (16) does not in their opinion conflict with their decision and their Lordships Shephard and Subramania Aiyar, JJ., say in *Cheekati Zamindar* v. *Ranasoori Dhora* (18) that *Achayya* v. *Hanumantarayudu* (16) is not irreconcilable with *Venkatacharlu* v. *Kandappa* (17) if regard be had to the facts found in the former case, facts however which are not referred to in the report of the case; the most important of such facts being that there were previous decisions relating to the same village in which the cultivators were held to have had no right of occupancy. But as Justice Shephard nevertheless remarks—

> "It was in reality quite unnecessary in *Achayya* v. *Hanumantarayudu* (16) to decide any question as to the burden of proof."

Cheekati Zamindar v. *Ranasoori* (18) thus approved of *Venkatacharlu* v. *Kandappa* (17) and virtually dissented from the rule enunciated in *Achayya* v. *Hanumantarayudu* (16).. *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (19) and *Cheekati Zamindar* v. *Ranasoori* (18) which are cases relating to zamindars and their estates are important only as showing that their Lordships regarded cases of inams as on the same footing so far as this question of occupancy right is concerned. In *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (19) especially, the learned Judges make it quite clear that the Government, the zamindars and inamdars stood in the same position in relation to their ryots by referring approvingly to the passage from the proceedings of 1818 of the Board of Revenue which has been set out above *in extenso*. It is, however, noteworthy that though *Venkatacharlu* v. *Kandappa* (17) laid

16. (1891) I L R 14 M 269. 17. (1891) I L R 15 M 95.
18. (1899) I L R 23 M 318. 19. (1897) I L R 20 M 299: 7 M L J 251.

down the rule as to onus substantially the same way in which it was laid down in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (19), no reference was made in it to the position of the inamdars as the assignees of the Government's share of the revenue—the reason in fact which is suggested for the rule impliedly in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (19) and more explicitly in later cases.

In *Ekambara Aiyar* v. *Meenatchi Ammal* (20), a case of a shrotriemdar and his ryot, Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar thought that the legal relation between zamindars, jagirdars, shrotriemdars and inamdars, etc., and their ryots was fully considered in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (19) and *Cheekati Zamindar* v. *Ranasoori* (18) and they therefore unhesitatingly and without any further discussion followed those rulings and held that the tenant in the case before them had a right of occupancy. In *Marapu Tharalu* v. *Telukula Neelakanta Behara* (21) the same view as to the onus being on the inamdar to prove that the lands themselves were given to him as inam prevailed as in *Venkatasubbaraya Sastri* v. *Kristnaiya* (22) (a decision of Bhashyam Aiyangar and Moore, JJ.). A distinction was, however, drawn between zamindars and inamdars as regards cases in which at the commencement of the tenancy both the *melvaram* and *kudivaram* rights are vested in the landholder. According to the *Cheekati case* (18) even in the case of waste lands or relinquished lands in which the zamindar owns both the *kudivaram* and the *melvaram* interests, if he admits a ryot to possession of such lands, the presumption would be that the ryot thereby acquires the right of occupancy just as in the case of the ordinary zamindari lands. But according to *Marapu Tharalu* v. *Telukula Neelakanta Behara* (21) it would be different in the case of inamdars and the presumption in favour of the acquisition of the right of occupancy would not apply in the case of lands in which the inamdar either initially owned the *kudivaram* or subsequently acquired it by relinquishment or otherwise. [*See* the explanation of *Marapu Tharalu* v. *Telukula Neelakanta Behara* (21) in *Bhadrayya* v. *Bapayya* (23). *See* also *Krishna Patrudu* v. *Mukunda Sahu* (24) which seems to imply the contrary].

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18. (1899) I L R 23 M 318.

19. (1897) I L R 20 M 299: 7 M L J 251.

20. (1903) I L R 27 M 401.

21. (1907) I L R 30 M 502.

22. (1902) 20 M L J 526.

23. (1911) 21 M L J 803.

24. (1910) 8 M L T 96: 6 I C 586.

This distinction has been recognised in the Estates Land Act, in the definition S. 3 (2) (*d*) where an estate is defined as "any village of which the land revenue alone has been granted in inam to a person not owning the ***kudivaram*** thereof" as well as in the exception to S. 8 where, after providing for merger of occupancy right in the case of estates generally, the legislature proceeds to lay down that "Notwithstanding anything contained in this section where, before or after the commencement of this Act, the ***kudivaram*** interest in any land comprised in an estate falling within cl. (*d*) of sub-sec. (2) of S. 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate."

The passing of the Estates Land Act with its definition of an estate as set out in the previous paragraph has occasioned a controversy unprecedented in the history of land tenures in this presidency, a controversy which does not yet seem to have come to a close. In every case in which an inamdar sues his ryot in ejectment, this definition necessitates an inquiry into the nature of the original inam grant and into the circumstances surrounding such grant. It has first to be determined whether the inam consisted of both ***melvaram*** and ***kudivaram*** or of the ***melvaram*** alone and if the latter, it has next to be decided whether on the date of the grant the ***kudivaram*** interest vested in the inamdar or in some other person. It is not necessary to refer at length to the various cases that arose in the Madras High Court in regard to this question, with which every lawyer in this presidency is familiar. But it is interesting to note the way in which the discussion progressed. All sorts and kinds of distinctions were attempted in support of the claims of the inamdars. Inams granted by the Government, it was suggested, stood on a different footing from inams granted by zamindars. [Vide *Maddu Yerrayya* v. *Kangali Naidu* (25), *Lakshminarasimha Rao* v. *Sitaramaswami* (26) and *Suryanarayana* v. *Potanna* (27)]. Inams consisting of a whole village or villages must, it was argued, be accorded a separate and a different treatment from inam grants of particular extents in a village. [See *Lakshminarasimha Rao* v. *Sitaramaswami* (26)]. It was seriously contended that what is applicable to post-settlement grants does not apply to pre-settlement grants. [See *Venkatramiah* v. *Narayudu* (28)]. A distinction was even

25. (1910) I L R 34 M 246: 20 M L J 764.
26. (1913) 24 M L J 288.
27. (1915) I L R 38 M 608: 26 M L J 99.
28. (1912) 12 M L T 313.

sought to be based upon whether the original grantee belonged to an agricultural or a non-agricultural caste. [See *Venkatanarasimha Appa Rao Bahadur* v. *Subba Reddi* (29) and *Suryanarayana* v. *Potanna* (27)]. But all these distinctions were held to make no real difference in principle and the rule that was ultimately enunciated was broad enough to cover every one of those cases. The following comprehensive statement of the rule may be extracted from the head-note to the case reported in *Suryanarayana* v. *Potanna* (27) "Whether it is a whole village inam or a minor inam situate in a zamindari or in an inam village, the presumption is the same, viz., the grant is only a grant of the *melvaram* and it lies on the grantee to show that the grant was of both the *melvaram* and the *kudivaram* or that he owned the *kudivaram* when the inam was granted. The presumption arises irrespective of the person who is said to have originally made the grant" (whether it is the Crown or the zamindar) and we may perhaps add whether it was made before the permanent settlement or after it.

The rule thus stated was applied in cases without number both before and after *Suryanarayana* v. *Potanna* (27). [See *Bhadrayya* v. *Bapayya* (23), *Lakshminarasimha Rao* v. *Sitaramaswami* (26), *Venkatanarasimha Appa Rao Bahadur* v. *Subba Reddi* (29), *Narasimhacharyalu* v. *Ramabrahmam* (30), *Virabhadrayya* v. *Venkanna* (31), *Sitamraju Ramabrahmam* v. *Lakshmanna* (32), *Viswanadha Rao* v. *Chinnakolandai Nainar* (33), *Ambalavana Pandara Sannadhi* v. *Janaki Ammal* (34), *Govinda Reddi* v. *Ravi Kesavalu Naidu* (35), *Devi Shuknoji Kasidoss* v. *Narayana Reddi* (36), *Venkata Sastrulu* v. *Sitaramudu* (37), etc.].

Reference must be made here to certain slight differences of opinion that were felt for a time but which did not, however, leave anything like a permanent impression. The case in *Marapu Tharalu* v. *Neelakanta Behara* (21) to which reference has already been made was understood in some cases as being opposed to the rule as to presumption as set out in the

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21. (1907) I L R 30 M 502.
23. (1911) 21 M L J 803.
26. (1913) 24 M L J 288.
27. (1913) I L R 38 M 608: 26 M L J 99.
29. (1912) 24 M L J 655.
30. (1913) 24 M L J 656.
31. (1913) 24 M L J 659.
32. (1912) 20 I C 843.
33. (1913) 1 L W 197.
34. (1914) 26 I C 618.
35. (1914) 29 I C 1003.
36. (1915) M W N 209.
37. (1912) I L R 38 M 891: 26 M L J 585.

previous paragraph [see *Suryanarayana* v. *Potanna* (27), *Chinnan* v. *Kondam Naidu* (38) and *Venkatrayudu* v. *Subbarayudu* (39)]. But it would rather appear that it was not really opposed to that line of cases and that the proper explanation of *Marapu Tharalu* v. *Neelakanta Behara* (21) is the one given in *Bhadrayya* v. *Bapayya* (23), the effect of which has been already stated in a previous paragraph. Even if we are to take it that their Lordships really wanted in *Marapu Tharalu* v. *Neelakanta Behara* (21) to lay down broadly that the presumption applicable to zamindaris is not applicable to inams, that case cannot be said to have affected the current of judicial opinion to any appreciable extent.

There was one point which, though not of very much importance, did, however, occasion some real difference of opinion. Since the jurisdiction of Civil Courts would be ousted if an inam fell within the definition of an "estate" as given in the Estates Land Act it was thought that the onus of proving that it was such an inam lay on the party alleging it. This involved a proof not only that the inam consisted of the *melvaram* alone but also of the further fact that the grant was to a person who did not own the *kudivaram* at that time. This suggestion as to onus based on considerations of jurisdiction originated with *China Nagadu* v. *Venkatasubbayya* (40). There was an obvious conflict between these two rules as to burden of proof and the anomaly was noticed very early of the onus of proof being placed on different parties in the same suit for the purpose of deciding the question of jurisdiction and for deciding the question of the landlord's title to eject. [See *Veerabhadrayya* v. *Venkanna* (31)].

It will be noticed that the trouble really lay in deciding whether the inamdars did or did not own the *kudivaram* at the time of the grant for as regards the question of the *quantum* of the grant, the presumption was always in favour of the ryot whether a question of jurisdiction was involved or not and the rule as to onus based on considerations of jurisdiction merely went to support the rule of substantive law that an inam *prima facie* consisted of the royal share of the produce only. In *Veerabhadrayya* v. *Venkanna* (31) their Lordships Benson and Sundara Aiyar, JJ. felt doubts as to whether a presumption

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21. (1907) I L R 30 M 502. 23 (1911) 21 M L J 803
27. (1913) I L R 38 M 608: 26 M L J 99.
31. (1913) 24 M L J 659. 38. (1913) 26 M L J 169.
39. (1918) 8 L W 599. 40. (1910) M W N 639.

that the grantee of an inam was not the owner of the *kudivaram* at the time of the grant would be justifiable. In *Suryanarayana* v. *Potanna* (27), however, Justice Sadasiva Aiyar characterised the distinction made in *Chinna Nagadu* v. *Venkatasubbayya* (40) "between the presumption to be drawn where the jurisdiction of the Civil Courts will be ousted if the inamdar is held not to own the *kudivaram*, and the presumption to be drawn if no such question of jurisdiction arises in the suit" as a little too fine and far fetched and held that the burden of proving that an inamdar was the owner of *kudivaram* at the time of the grant lay upon the inamdar himself. His Lordship took the same view in *Chinnan* v. *Kondam Naidu* (38) also. A different view was, however, taken in two cases. *Jagannathacharyulu* v. *Kutumbarayudu* (41) and *Bapi Reddi* v. *Venkatacharyulu* (42) and in a still later case reported in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (43) Justice Sadasiva Aiyar followed the view expressed in those two cases in preference to his own and held that the person seeking to oust the jurisdiction of Civil Courts by alleging that the inamdar was not the owner of the *kudivaram* at the time of the grant ought to prove his said allegation.

Excepting for *Marapu Tharalu* v. *Neelakanta Behara* (21) and an obscure judgment in *Mahomed Meera Lavvai* v. *Ramalinga Pillai* (44) and the difference of opinion just noticed about the presumption regarding the question whether the inamdar was or was not the owner of the *kudivaram* at the time of the inam grant, it can be safely asserted that for two decades if not more, the rule was universally laid down that an inam must be presumed (till the contrary is proved) to have consisted only of the *melvaram* interest. In case after case learned Judges of our High Court including some very distinguished Judges who were thoroughly conversant with the country, its tenures and its people unhesitatingly accepted and applied that presumption. And the same view was taken and for a much longer time in the Bombay High Court.

Then came a series of Privy Council decisions which to say the least took everybody by surprise. The earliest of these was *Suryanarayana* v. *Potanna* (45) reversing the decision of

21 (1907) I L R 30 M 502. 27. (1915) I L R 38 M 608: 26 M L J 99.
38. (1913) 26 M L J 169. 40. (1910) M W N 639.
41. (1914) 27 M L J 233. 42. (1914) 27 M L J 567.
43. (1916) 33 M L J 84. 44. (1911) M W N 84.
45. (1918) I L R 41 M 1012: 36 M L J 585 (P C).

the High Court reported in *Suryanarayana* v. *Potanna* (27). The reasoning of their Lordships in this case is interesting. Referring to the long course of decisions on the subject in the Bombay and Madras High Courts their Lordships observe: "The learned Judges of the High Court acted upon what they conceived to be a presumption of law, deduced by them from some decisions of the High Court at Madras and of the High Court at Bombay, to the effect that in the case of an inamdar it should be presumed, in the absence of the inam grant under which he held, that the grant was of the royal share of the revenue only and they cited the decisions upon which they relied as authorities. Some of those decisions to which they referred do not upon an examination of them support the opinion of those Judges as to the presumption which they applied in these suits. In their Lordships' opinion there is no such presumption of law."

Referring to a contention that in the times when the Reddi Kings ruled in the district the ownership of the soil was not in the sovereign or ruler, and that the right of the ruler was confined to a right to receive a share in the produce of the soil from the cultivator, their Lordships proceed to state that "that is an assumption which no Court is entitled to make and in support of which there is no reliable evidence." Then comes the most questionable part of the judgment. "The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them; indeed that fact would support the contrary assumption that the soil was vested in the rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which was not a fixed and invariable share but depended on the will of the rulers." They then rely in support of it upon the opening words of the preamble to Regulation XXXI of 1802 where it is recited that "whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description," language which is very similar to and almost identical with the language used in the preamble to Regulation XXV of 1802. It is well known how the latter regulation necessitated the passing of the

27. (1915) I L R 38 M 608: 26 M L J 99.

Interpretation Regulation IV of 1822 which declared in effect if not in so many words that the offending expressions were a mere flourish and were meaningless. The reliance which the Judicial Committee placed upon Regulation XXXI of 1802 in this case, and the inference they sought to deduce from it, are directly opposed to *Collector of Trichinopoly* v. *Lekkamani* (46) where the Judicial Committee itself said that the above regulation "never intended to assert that according to the usages of the country there was no private right to lands." And one might say with confidence that the contrary assumption which their Lordships wanted to formulate in *Suryanarayana* v. *Potanna* (45) is opposed to Hindu and Mahomedan legal conceptions and usages, to popular consciousness and to the opinions of experienced administrators and distinguished Judges and has nothing in fact to support it.

The next two decisions of the Privy Council, *Venkata Sastrulu* v. *Seetharamudu* (47) and *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) were something of a climb-down, *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) more so than the other case. In *Venkata Sastrulu* v. *Seetharamudu* (47) which was also a reversing judgment, their Lordships first say by a reference to *Suryanarayana* v. *Potanna* (45) that no such presumption as was acted upon by the High Court exists. They then add that "each case must therefore be considered on its own facts" and that "in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained." And following the rule which they thus set for themselves their Lordships come to the conclusion that the "main grant carried not the land revenue alone but the whole proprietary interest in the property."

There is, however, no reference in this case to the "contrary assumption" of *Suryanarayana* v. *Potanna* (45) and *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) makes it quite clear that each case must be dealt with upon its own facts with special regard to the evidence and circumstances therein disapproving of the initial presumption in favour of the inamdar which a Full Bench of the Madras

45. (1918) I L R 41 M 1012: 36 M L J 585 (P C).
46. (1874) L R 1 I A 282.
47. (1919) I L R 43 M 166. 37 M L J 42 (P C).
48. (1922) I L R 45 M 586: 43 M L J 640 (P C).

Court deduced in *Muthu Goundan* v. *Perumal Iyen* (49) from the previous decisions of the Judicial Committee. It is not, however, easy to accept their Lordships' statement that neither in the case of *Suryanarayana* v. *Potanna* (45) nor in *Seturatnam Aiyar* v. *Venkatachela Goundan* (50) is there a suggestion of a presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other. The judgment in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) indicates an anxiety on the part of the Judicial Committee to qualify and explain what was said in *Suryanarayana* v. *Potanna* (45). It is noteworthy that Mr. Ameer Ali who delivered the judgment of the Judicial Committee in this case [*Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48)] set out *in extenso* and approvingly referred to the passage to which reference has already been made more than once, the passage occurring in the Proceedings of the Board of Revenue of the 5th Jan. 1818 and relating to the nature of the relations between the Government, the zamindars and the inamdars on the one side and the cultivators on the other, though he did not deduce from the passage any presumption in favour of the ryot as was done in the earlier cases decided in this country, a deduction which one would think is a logical outcome of what was said therein.

The rule laid down in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) even if not quite accurate in theory was at any rate harmless in practical application. And it was repeated by the Judicial Committee in almost identical terms in a Bombay case which related to a saranjam grant [*Secretary of State for India* v. *Laxmibai* (51)] and which reversed the judgment and decree of the Bombay High Court in *Guru Rao* v. *The Secretary of State for India* (12).

Matters were, however, not left in this state very long. In *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) Sir John Edge [who had delivered the judgment in *Suryanarayana* v. *Potanna* (45) also] made some observations which are too sweeping in their character and which will have the effect of abrogating the rule laid down in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48). There is an

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12. (1916) I L R 41 Bom 408.
45. (1918) I L R 41 M 1012: 36 M L J 585 (P C).
48. (1922) I L R 45 M 586: 43 M L J 640 (P C).
49. (1921) I L R 44 M 588: 40 M L J 429 (F B).
50. (1919) I L R 43 M 567: 38 M L J 476 (P C).
51. (1922) I L R 47 Bom 327: 44 M L J 471 (P C).
52. (1923) I L R 47 M 337: 46 M L J 546 (P C).

obvious conflict between these two decisions and the Judicial Committee itself will have to tell us some day how, if at all, these cases are reconcilable with each other. There is nothing to be said against that part of the judgment in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) which is devoted to a construction of the sanad or to a discussion of such of the evidence in the case as was afforded by the register of 1809, the paimash account of 1816-17 or the conduct and dealings of the parties. In fact even the conclusions come to in *Suryanarayana* v. *Potanna* (45) and in *Venkata Sastrulu* v. *Seetharamudu* (47) can, as pointed out by Mr. Ameer Ali in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) be supported on the evidence on record without regard to any theory as to onus. But it is a matter for regret that observations should have been made in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) ignoring what was said by the Judicial Committee itself in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) less than two years previously and upsetting the rule as to onus therein laid down. It is difficult and perhaps even impossible to support the broad statement that "it cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant." And this startling statement is sought to be supported by a reference to two and only two decisions, one in *Seturatnam Aiyar* v. *Venkatachela Goundan* (50) which related to a ryotwari pattadar and his tenants and which can hardly be regarded as applicable to cases where the landlord happened to be an inamdar or a zamindar and the other case in *Secretary of State for India* v. *Luchmeswar Singh* (53) which does not present anything like a parallel. It was a case in which the Government got into possession of a village known as Malinuggur which was part of the milkiat or zemindari of Darbhanga and in which all that the Government offered in support of their contention that they were perpetual tenants was in the language of Lord Hobhouse, "Some conjecture of

45. (1918) I L R 41 M 1012: 36 M L J 585 (P C).
47. (1919) I L R 43 M 166: 37 M L J 42 (P C).
48. (1922) I L R 45 M 586 : 43 M L J 640 (P C).
50 (1919) I L R 43 M 567: 38 M L J 476 (P C).
52. (1923) I L R 47 M 337. 46 M L J 546 (P C).
53. (1888) I L R 16 C 223 (P C).

an agreement founded simply on their long possession at a uniform rate of payment." It was really a case in which permanent tenancy by "grant" was set up and found against and it certainly does not bear out the sweeping proposition sought to be based upon it—a proposition which would be applicable not only to all kinds of tenures but also to all cases in which a defence of occupancy right is set up irrespective of whether it is based on statute, custom or grant.

One would think that at least in this presidency the rule as to onus of proof instead of being established beyond doubt in the way in which His Lordship Sir John Edge stated it, was established very much the other way. Whether one turns to the cases in which the Government figured as the landlord or to the cases which related to zamindars or inamdars one finds that it was the plaintiff that had to make out that the tenancy was a terminable one and that it was validly terminated. Cases arising between ryotwari pattadars and their tenants were of course to the opposite effect but they stand on an entirely different footing. It can therefore be said without much fear of contradiction that the broad proposition enunciated by their Lordships of the Judicial Committee in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) has little or no material to support it. And curiously enough even the decisions of the Privy Council which immediately preceded *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) do not themselves support such a proposition and they are not even referred to in the later case.

It is easy to point out that *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) and *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) must necessarily work at cross purposes. To take the most obvious illustration—the one that is afforded by these very cases of a suit by an inamdar against his ryot, if the ryot wants to rely upon the Estates Land Act in support of his right of occupancy, he has according to *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) to make out that the particular inam is an estate or in other words he has to prove firstly that the land revenue alone was granted in inam and secondly that it was granted to a person not owning the *kudivaram*. *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48), however, merely makes it a matter of decision on the evidence adduced by both parties.

48. (1922) I L R 45 M 586: 43 M L J 640 (P C).
52. (1925) I L R 47 M 337: 46 M L J 546 (P C).

Even after the decision of the Privy Council in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) strictly laying down that each case must be decided on its own facts it was held in *Venkatarangayya Appa Rao Bahadur* v. *Bajiraju* (54) in a case in which a zamindar sued to eject an inamdar after resuming the inam that "inasmuch as plaintiff sues in ejectment he is bound to prove that he has a right to eject" and that he can do that only by proving that he granted the land itself and is entitled to resume it. The Privy Council decision in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) has started another line of cases which are very much in favour of the inamdar [*see* for instance *Narayana Doss* v. *Sankara Subba Aiyar* (55) per Ramesam, J., *Thirupathi Goundan* v. *Shamanna Goundan* (56) per Devadoss, J. and *Annamdevula Thata* v. *Khwaja Ahamadulla Khan Saheb Bahadur* (57)], and against the cultivating ryot but the scope and effect of *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52) cannot, by any means, be said to have been finally determined yet. [See *Subbarayudu* v. *Narasimha Rao* (58), *Periakaruppa Thevan* v. *Aiyanars and Kaniyalaswamigal Kovil Devasthanam* (59) and A. S. No. 177 of 1921 where *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) was followed in preference to *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52)].

It is impossible to exaggerate the disastrous effects which these kaleidoscopic changes of judicial opinion have produced and will produce upon the litigant world. It may be asked whether the legislature ought not even now to step in and prevent further controversy by giving effect to the salutary principle enunciated in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) though not to the stricter view taken in the Madras rulings before *Suryanarayana* v. *Potanna* (45). There is at present an acute difference of opinion among the learned Judges of the Madras High Court in the matter of interpreting the conflicting decisions of the Privy Council in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (48) and *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (52). A reference to a Full

45 (1918) I L R 41 M 1012: 36 M L J 585 (P C).
48. (1922) I L R 45 M 586: 43 M L J 640 (P C).
52. (1923) I L R 47 M 337: 46 M L J 546 (P C).
54. (1923) 45 M L J 238.
55. (1925) 21 L W 692.
56. (1924) 48 M L J 654.
57. (1924) 48 M L J 701
58. (1924) 47 M L J 558.
59. (1925) 49 M L J 602.

Bench is imminent with every likelihood of matters being carried up to the Privy Council. A prompt intervention of the legislature to prevent further waste of public time and money and to avoid unnecessary and costly litigation is therefore, to say the least, very much called for.

I have not thought it necessary to refer to the familiar controversy about post-settlement minor inams in which certain excusable mistakes in statute-drafting have led to results which are neither happy nor equitable. The Full Bench decision in *Jarugumilli Brahmayya* v. *Achiraju* (60) has for the time being and at least so far as the High Court is concerned set the matter at rest but it is agreed on all hands that the legislature should intervene to put such post-settlement minor inams on the same footing as major inams.

V. GOVINDARAJACHARI,
High Court Vakil.

SUMMARY OF ENGLISH CASES.

BRITISH AMERICAN CONTINENTAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE, (1926) 1 K. B. 328 : 95 L. J K. B. 326.

Contract—Money paid under mistake of fact to agent—Agent paying away money but subsequently repaid—Suit for recovery.

A entered into a contract with *B* to sell a quantity of francs and under the contract *A* was to deliver the same to *C*, the agent of *B*. *C* was to pay over the same to the bankers of *B* at Antwerp. On the morning of the day on which the contract was to be performed *B* cabled to *A* that the contract need not be performed, as he would be unable to pay for the francs on account of insolvency proceedings. By the time this cable was received, *A's* agent had handed over the francs to *C* who had passed it on to the bankers of *B*. *A* thereupon requested the bankers of *B* to return the francs, and they returned it to *C*, who under instructions from the Receiver in bankruptcy refused to return them to *A*. In an action for the return of the money against *C* on the ground it had originally been paid under a mistake of fact, *held*, as *A* was unaware at the time of payment of the bankruptcy of *B* he was entitled to the return ; and as the bankers of *B* had returned it to *C*, he was bound to repay it to *A*.

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60. (1922) I L R 45 M 716: 43 M L J 229 (F B).

It is indisputable that if money paid under a mistake of fact is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received.

BRITISH INSULATED AND HELSBY CABLES, LTD. *v.* ATHERTON, 95 L J K B 336.

Income-tax—Deduction—Pension fund inaugurated by company—Lump sum contributed by company to establish fund—Nature of—If an item of deduction—Income-tax Act, 1842, *Sch. D, Case* 1, *R.* 3.

A company which had a big staff inaugurated a pension fund, based on contributions to be made by both the employer and the employed. To form the nucleus of the fund and to enable old servants who had not up to that time contributed, to participate in the fund, the company made a lump contribution of £31,784, a sum arrived at by an actual calculation on the basis that it should be exhausted as soon as the claims of the then existing staff were satisfied. The company claimed to deduct this amount for purposes of calculating its income-tax for the year when it was so set apart. *Held,* by a majority of the House of Lords (*Lords Carson and Blanesburgh dissenting*) affirming the decision of the Court of Appeal in (1925) 1 K. B. 421 that it was not an item of deduction for computing the profits of the year.

Per Viscount Cave, L. C.—The amount set apart is properly attributable not to revenue but capital expenditure and cannot be an item of deduction in calculating profits.

Per Lord Atkinson.—The payment of the sum amounted to an actual employment or intended employment of it as capital in trade, manufacture, etc., within the meaning of R. 3 of Case 1 of Sch. D.

Per Lord Buckmaster.—The amount was exclusively laid out for the purposes of the trade, and being an amount set apart as the nucleus of the Fund cannot be properly deducted in determining the balance of profits and gains.

Per Lord Carson.—An annual sum contributed to the pension fund on an actuarial basis for making the fund solvent for paying the pensions of the older members of the staff would be an ordinary business expense and hence a proper item of deduction. The lump sum set apart is only the actuarial equivalent of the same and cannot stand on any different basis.

Per Lord Blanesburgh.—The amount set apart represents a sum which comprised and compressed a series of annual payments on account of the employees. Quoad the company it is

in no material respect different from payments of salary made directly. The payment is properly attributable only to the revenue and not capital expenditure.

Case-law discussed.

LAKE *v.* SIMMONS, (1926) 1 K. B. 366.

Insurance—Policy—Construction of—Larceny by trick—Jewel handed to customer for approval—Theft of—Liability of insurer.

An insurance policy issued to a jeweller exempted the insurer from liability for "loss by theft or dishonesty committed by any customer in respect of goods entrusted to him." A customer took from the jeweller a jewel pretending to take it for the purpose of showing it to her husband for approval, and thereafter disposed of it for her own benefit. *Held*, she was guilty of larceny by a trick amounting to theft within the meaning of the policy, but as the jewel was only entrusted to her as agent of her husband, a prospective customer, the clause in the insurance policy did not protect the insurer from liability.

GRAINGER *v.* MAXWELL, (1926) 1 K. B. 430 : 95 L J K. B. 245.

Income-tax—Exchequer Bonds and War Loan Securities—Redemption of Bonds—No income therefrom during year of assessment—Interest received in preceding year—If basis of assessment—Income-tax Act, 1918, *Sch. D, Case III.*

An assessee held certain Exchequer Bonds and War Loan Securities. The former were redeemed in February, 1920 and consequently he received no interest therefrom. The Inspector of Taxes treated both as falling under one head, *i. e.*, Government bonds and claimed tax on the basis of the preceding year's receipts. *Held*, by the Court of Appeal affirming the decision of *Rowlatt, J.*, in (1925) 2 K. B. 376 that each was a unit of measurement by itself and as in the year of assessment there was no profit received from the Exchequer Bonds, recourse could not be had to the income of the previous year. (1921) 2 A. C. 222 applied.

RYE *v.* PURCELL, (1926) 1 K. B. 446 : 95 L. J. K. B. 380.

Landlord and tenant—Lease—Holding over—Payment of increased rent—Agreement in writing signed by lessor only—Covenants in old lease—If pass—Conveyancing Act, 1881, *S.* 10.

A lease of certain properties was granted for a period of 21 years, containing a covenant to deliver up the premises in

good repair. The interest of the landlord devolved by a series of assignments on the plaintiff, and shortly before the expiry of the lease there was a verbal agreement between the lessee and the plaintiff's immediate assignor to hold over at an increased rent. This agreement was confirmed by a letter written on behalf of the plaintiff's assignor. When the premises were finally handed over by the tenant, the plaintiff found them to be in a bad state of disrepair and thereupon he sued the lessee for damages for breach of the covenant. *Held,* (1) the terms of the old lease were by necessary implication incorporated into the new bargain; and (2) though the agreement to hold over was verbal, the subsequent confirmation of it by a letter written on behalf of the plaintiff constituted a sufficient "agreement in writing" within the meaning of S. 10 of the Conveyancing Act, 1881 to entitle the plaintiff to maintain the action.

Quaere: Whether the actual payment of increased rent after the expiry of the original period to the plaintiff after he acquired the reversion did not by itself entitle the plaintiff to sue on a breach of the covenant?

BRIGHTON COLLEGE *v.* MARRIOTT, (1926) A. C. 192: 95 L. J. K. B. 356.

Income-tax—Charity—Public school—Profits derived from school fees—If profits or gains of a trade—Income-tax Act, 1918, S. 37, Sch. D.

Brighton College is a public school, managed by a company incorporated under the Companies Acts, and its sole object was to provide a good secular and religious education. The income derived from school fees, after meeting the expenses, was devoted to the improvement of the college and could in no way be divided among the shareholders of the company. The question arose whether the surplus income was assessable to tax. *Held,* by the House of Lords affirming the decision of the Court of Appeal in (1925) 1 K. B. 312 that the college though a charitable object within the meaning of the Statute of Elizabeth, must be deemed to be carrying on a trade, even though the profits are used only for the purposes of the charity and as such the surplus income was assessable to tax. Nor could the surplus profits be regarded as "yearly interest or annual payment" falling within S. 37 of the Income-tax Act, 1918, which is exempted from taxation.

LAPISH *v.* BRAITHWAITE, (1926) A. C. 275 : 95 L. J. K. B. 406.

Municipality—Councillor—Alderman—Share or interest

in municipal contract—Managing director of company having contract—Disqualification arising from—Municipal Corporations Act, 1882, *Ss.* 12, 14.

Under S. 12 of the Municipal Corporations Act, 1882, a person is disqualified to be a Councillor if he "has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by or on behalf of the Council, but a person shall not be so disqualified, or be deemed to have any share or interest in such a contract or employment, by reason only of his having a share or interest." S. 14 fixed that a person should not be qualified to be an alderman unless he is or qualified to be a councillor. *Held*, an alderman, who was a shareholder and managing director of a company having a contract with the Municipal Council and who was given a fixed pay but not commission, is not disqualified under Ss. 12 and 14 to be an alderman.

Desirability of changing the law by Legislation pointed out by the Lord Chancellor.

CORNISH MUTUAL ASSURANCE COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE, (1926) A. C. 281 : 95 L. J. K. B. 446.

Corporation tax—Mutual Insurance Company—If carries on trade or business—Finance Act, 1920, *S.* 52.

A company limited by guarantee and having no share capital carried on mutual fire insurance business. Each policy-holder became a member on taking out a policy and remained as such so long as his right to protection under the policy existed. The income of the company consisted of entrance fees, calls (if made), and interest on investment and was used for current expenses and payment of policies. The question arose whether the company was liable to pay Corporation tax. *Held*, though the company was only carrying out transactions with its own members, it did carry on a trade or business within the meaning of S. 52 of the Finance Act, 1920 and the surplus fund did constitute profits for the purpose of assessing Corporation profits tax.

HARTLAND *v.* DIGGINES, (1926) A. C. 289 : 95 L. J. K. B. 406.

Income-tax—Office or employment—Employer paying income-tax on salary of the employees—No agreement to pay—Income-tax paid if part of profit, perquisite or emolument—Income-tax Act, 1842, *Sch. E.*

A shipping company used to pay the income-tax on the salaries of all their employees and the amount so paid was

allowed as a trade expense in arriving at the profits of the company for purposes of assessment. There was, however, no agreement between the company and its employees to pay the income-tax. The question arose whether the income-tax paid was also part of the profits or emoluments of the employee, on which he was assessable to income-tax. *Held*, affirming (1925) 1 K. B. 372 that it was assessable, as it represented money's worth. The fact that the payment by the Company was voluntary made no difference in the matter.

WHELAN *v.* HENNING, (1926) A. C. 293 : 95 L. J. K. B. 406.

Income-tax—Shares—Dividends in prior years—No dividend during year of assessment—Claim based on average of three years—Liability to pay—Income-tax Act, 1918, *Sch. D, Case V, R.* 1.

A person possessed a number of shares in Ceylon on which he used to receive dividends. But during a particular year no dividends were declared, but he was sought to be made liable for purposes of income-tax on the basis of the usual three years' average. *Held*, affirming (1925) 1 K B 387, the receipt of income in the year of assessment is necessary before a person can be taxed under Case V of Sch. D of the Income-tax Act, 1918, and there being no income received, he was not liable to assessment.

In re DES REAUX AND SETCHFIELD'S CONTRACT, (1926) 1 Ch. 178.

Sale of land—Vendor refusing to apply to Court for order enabling him to give a good title—Ground of expense—Vendor rescinding contract—If entitled to.

An agreement to sell a house contained a clause "If the purchaser insists on an objection or requisition which the vendor shall be unable, or on the ground of expense, unwilling to remove or comply with, the vendor may by notice rescind the contract". As the title deeds did not show a clear title, the vendee asked the purchaser to apply to Court to get directions with a view to perfect the title. This the vendor refused to do on the ground of expense and afterwards gave notice rescinding the contract. *Held*, he was not entitled to rescind the contract on the ground that to take the steps pointed out by the purchaser would involve him in expense, nor was it a reasonable exercise of the condition.

In re CITY LIFE ASSURANCE COMPANY, LTD., (1926) 1 Ch. 191.

Company—Life insurance—Mortgage of policy to com-

pany—Liquidation—Set off—If allowed—Equitable assignment of mortgage to trustees—No notice to mortgagor—Effect of winding up—Bankruptcy Act, 1914, *S.* 31.

The owner of an insurance policy mortgaged it to the Insurance Company and went on paying premia regularly up to the end. Thereafter the Company went into liquidation and the policy-holder claimed to set off the amount of his mortgage debt against the value of his policy. *Held,* he was entitled to do so under S. 31 of the Bankruptcy Act, 1914. *Ex parte Price,* 10 Ch. D. 648 overruled; (1924) 2 Ch. 339 followed.

Where however after such a mortgage had been effected, the Company equitably assigned it to trustees, though without notice to the mortgagor, and thereafter winding up proceedings commenced, no right of set off arises, inasmuch as after the assignment there is no mutual credit or debt between the Company and the policy-holder. Case-law discussed.

In re BLACKWELL : BLACKWELL *v.* BLACKWELL, (1926) 1 Ch. 223.

Will—Construction—Devise to eldest of sons (if any) "who shall be living at the time of my death absolutely upon his attaining 21"—Nature of estate taken.

A testator by his will devised his real estate on trust for the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of 21 years" and failing the same to be held upon the trusts concerning his residuary estate. He died leaving a widow, three daughters and a son a few months old. *Held,* by the Court of Appeal affirming (1925) Ch. 312 that on a construction of the will the son took a contingent and not vested interest in the estate, contingent on his attaining the age of 21 years. He took the same interest in the accumulations also.

PUBLIC TRUSTEE *v.* ELDER, (1926) 1 Ch. 266.

Partnership—Account—Suit for—Parties—Custodian of Enemy Property—Rights of parties.

A business was being carried on in London between an English partner who was also the managing partner and three German subjects. On the outbreak of war, the managing partner carried on the business and collected assets. Later the Custodian of the Enemy Property having been appointed to act and directed to wind up the business, he filed a suit claiming an account from the English managing partner of all transactions between the several partners *inter se*. *Held,* the relief could not be granted unless all the partners had been impleaded in the suit.

The legal relations of partners in a dissolved partnership summarised.

In re A. AND M., (1926) 1 Ch. 274.

Bankruptcy—Infants—If can be adjudicated—Adjudication order made—Cancellation—Costs.

Where debts are incurred by infants, not for any necessaries supplied to them, nor in any way enforceable against them, they cannot be adjudicated bankrupt even on their own petition.

Quaere: Where a receiving order is actually made and later annulled, if the Receiver can deduct his costs out of the assets ?

In re STOLLERY : WEIR *v.* TREASURY SOLICITOR, (1926) 1 Ch. 284.

Evidence—Marriage—Registration of births and deaths of children—If evidence of marriage of parents—Admissibility of extracts—Births and Deaths Registration Act.

In an enquiry relating to a claim for administration, the question arose whether *X* and *Y* had been lawfully married to each other. No marriage certificate or record was available, but certificates of birth of some of their children and of the death of another child were put in as evidence. *Held,* by the Court of Appeal reversing Romer, J., the certificates were admissible as evidence, but were in no sense anything like conclusive evidence as to a lawful marriage having taken place. The question of the evidentiary value of the several entries in the certificates and the inferences to be drawn therefrom is one for the Trial Court.

In re CASSELL : PUBLIC TRUSTEE *v.* MOUNTBATTEN, (1926) 1 Ch. 358.

Will—Construction—Trust to maintain house and contents—Validity—Rule against perpetuities—Scope and operation of.

The rule against perpetuities is concerned with the creation and vesting of interests, not with their duration. If the interest must necessarily arise and be vested within the period, its duration beyond the period is no infringement of the rule. An interest is not obnoxious to the rule if it begins within lives in being and twenty-one years, although it may end beyond them. In other words, the rule prohibits vesting outside the period. It does not prohibit distribution beyond the period.

The testator by his will bequeathed a house to trustees on trust to allow his granddaughter *X* to use and enjoy it for

her life and thereafter for such of her issue as she might by will appoint or in default the first of her sons attaining the age of 21 or failing a son to the first of her daughters attaining that age. Subject to those trusts, the trustees were to hold the property upon similar trusts in favour of certain other specified relations of the testator. Finally followed a clause directing the trustees to pay rates and taxes, keep the premises insured against fire and burglary and in a proper state of preservation out of the income of his residuary personal estate. *Held,* there was no infringement of the rule against perpetuities.

MART *v.* MART, (1926) P 24 : 95 L. J. P. D. & A 29.

Divorce—Adultery—Legitimacy of child—Presumption—Deed of separation—Effect of.

A husband and wife executed in 1922 a separation deed containing the usual covenants. In 1925 a child was born to the wife and in a petition for divorce filed by the husband, the question arose whether the existence of the separation deed so far rebutted the legal presumption of access during marriage as to make the husband's evidence of non-access admissible. *Held,* the separation deed has the same effect as a judicial separation order and puts an end to the legal presumption, cohabitation, access and legitimacy. Evidence of non-access on the part of the husband is not excluded by the *ratio* in *Russel* v. *Russel,* (1924) A. C. 687.

SNEYD *v.* SNEYD AND BURGESS, (1926) P. 27 : 95 L J. P. D. & A. 22.

Divorce—Adultery—Condonation—What is—Fraudulent obtaining of—Effect—Question of belief in innocence—If material.

Condonation is the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation, the whole being done with knowledge of all the circumstances of the particular offence forgiven. The question of the state of mind of the forgiving spouse is immaterial in considering the question of knowledge and hence an erroneous belief in the forgiven party's innocence procured by fraud or misrepresentation is not a point for consideration, where in fact there was a reconciliation.

BRITISH OXYGEN COMPANY *v.* LIQUID AIR, LIMITED, 95 L. J. Ch. 81.

Copyright—Letter written by manufacturer offering reduced terms to customer—If an original literary work—

Publication of photograph of letter—Infringement of copyright—Copyright Act, 1911, *Ss.* 1, 2.

A letter written to a customer by a manufacturer offering him specially reduced terms with the object of keeping his custom confined to themselves is an "original literary work" within the meaning of S. 1 of the Copyright Act and any one publishing or threatening to publish it can be prevented by an injunction from doing it. Nor could such publication be justified on the ground it amounted only to a "fair dealing with the work for the purposes of criticism" within the meaning of S. 2.

ALLEN *v.* ROYAL BANK OF CANADA, 95 L. J. P. C. 17.

Negotiable instrument—Bill or note given on account—Effect of—Effect—Suspension of remedy and not discharge of debt.

When a negotiable instrument is given by a debtor to a creditor on account and accepted by the latter, but there is nothing said as to the terms on which the note was given, there is no presumption that it was given and accepted by way of actual payment of the debt due. The legal effect of the transaction is that the original debt still remains but the remedy for it is suspended till maturity of the instrument in the hands of the creditor. And the remedy is equally suspended if the bill or note be given, not by the debtor, but by a stranger.

CAVEN *v.* CANADIAN PACIFIC RAILWAY, 95 L. J. P. C. 23.

Master and servant—Action for wrongful dismissal—Contract of service—Domestic forum for investigation of disputes.

A contract of service between a master and servant contained a clause that the latter should not be dismissed for misconduct without the charge being investigated into by certain persons and the aggrieved party was also given a right of appeal to certain other persons. A charge of dishonesty against the servant was enquired into by the contemplated tribunal and held proved. The servant did not elect to appeal, but filed an action for wrongful dismissal. *Held,* no such action lay, unless he first proved that the investigation before the private forum created by the agreement had not been properly conducted. Nor could he say that the clause for private investigation was invalid as ousting the jurisdiction of the ordinary Courts of the land.

JOTTINGS AND CUTTINGS.

The Presumption of Marital Coercion.—Prior to June 1, the rule of "marital coercion" prevailed. Where a married woman was charged with an offence committed in the presence of her husband, she was deemed, in the absence of proof to the contrary, to have acted under his "coercion" and was entitled to a verdict of acquittal. There were certain exceptions to this rule, *e. g.*, in cases of murder and treason no such presumption was admissible, nor was it admitted where the offence related to household management, *e. g.*, keeping a disorderly house, for there the woman was deemed to be in charge. The limits of application of the rule have never been accurately defined in the cases, nor has the exact ground for its origin ever been clearly ascertained, since no similar presumption has ever been made in the case even of a very young child, which is certainly under the control of its parents. Of late years sane public opinion has felt the rule to be unreasonable, and two or three years ago the notorious "Peel" trial at the Old Bailey led to an indictment of the rule by Mr. Justice Darling, who, however, had to give effect to it. A Commission, presided over by Mr. Justice Avory, enquired into the rule of law and reported in favour of its abolition. Bills to effect this, however, were opposed in the House of Lords by certain legal members of that House who took the view that in practice wives run danger of coercion. This view is not generally shared by persons acquainted with the modern world, and it has not finally prevailed. The present Act (S. 47) adopts a compromise and abolishes the presumption of coercion, but retains the plea as good provided it is proved that the wife, in fact, committed the offence under the coercion of her husband. No similar plea is available to a husband who commits an offence under the coercion of his wife, so that here once more strict logical equality between the sexes is not, in fact, brought about by the amendment of the law. Probably the resulting privilege in favour of wives is quite unimportant in actual practice. But there is a great deal to be said for rigorous logic in such matters, and failure to give effect to it because of the fancied advantages possessed by men sometimes leads to unexpected injustice, as Mr. Bingley has pointed out on two recent occasions in connection with the Custody of Children (Summary Jurisdiction) Act.

—*The Law Journal*, June 5, 1926, p. 485.

The Constitution of the Judicial Committee.—The debate on the Judicial Committee Bill, the second reading of which was moved by the Lord Chancellor on Tuesday, revealed a necessity, not merely for the increase of the *personnel* of the Judicial Committee itself, but for an increase in the number of Lords of Appeal in Ordinary. The Bill proposes to authorise the appointment, as members of the Judicial Committee, of two persons being members of the Privy Council, who are or have been Judges of a High Court in India, or who are barristers or advocates of not less than fourteen years standing, who practise or have practised in British India. Each such member of the Committee is to be paid a salary of £2,000 per annum out of the Consolidated Fund, and this may be increased by the Government of India up to £4,000. It is not proposed to make any further appointments of Indian Judges to the Committee under the Statutes of 1883 and 1908, pursuant to which Sir John Edge and Mr. Ameer Ali have for many years sat as members. Sir John Edge retired at the end of May, and the Lord Chancellor paid a graceful and well-earned tribute to the value of his services. Mr. Ameer Ali will remain a member of the Committee on the same footing as hitherto, but considerations of health have recently interfered with the regularity of his attendance. The increase in the number of Indian appeals is sufficient warrant for the present Bill, which will, no doubt, soon become law.

—*The Law Journal,* June 12, 1926, p. 508.

The Final Courts of Appeal.—The second reading of the Judicial Committee Bill served as the occasion for Lord Haldane and Lord Dunedin to call attention to the urgent necessity for the appointment of more Law Lords who could sit in the House of Lords as well as on the Judicial Committee. As Lord Haldane pointed out, he is at the moment the only ex-Lord Chancellor available. Lords Cave and Haldane, with the six Lords of Appeal, make up what may be called the regular *personnel* of the House of Lords in its judicial capacity, and they, with Mr. Ameer Ali, at present form the regular members of the Judicial Committee. The Judicial Committee finds it necessary to sit in two Divisions, so that to enable five Judges to form each Court —one in the House of Lords and two in the Judicial Committee—a total of fifteen Judges is wanted, and even that assumes that the Lord Chancellor sits with complete regularity, which he should not be expected to do. It has not

so far been found possible for both Divisions of the Judicial Committee to consist regularly of five Judges, and it has only been possible for two divisions to sit at all because peers like Lord Phillimore and Lord Darling have sacrificed their well-earned leisure to assist in the work of hearing appeals. It seems clear that an overwhelming case can be made out for an increase in the number of the Lords of Appeal in Ordinary, and we imagine that proposals to that end may be expected.

—*The Law Journal,* June 12, 1926, p. 508.

The Company Law Report.—The Company Law Committee appointed by the Board of Trade which sat last year, with Mr. Wilfrid Greene, K. C., as Chairman, has just issued its Report (Cmd. 2657, 1*s.* 3*d.*). The reference was "to consider and report what amendments are desirable in the Companies Acts, 1908 to 1917." The Committee held 38 meetings, and among the numerous witnesses examined were Mr. Justice Eve, Mr. A. F. Topham, K. C., and Mr. F. Whinney, the last-named being probably the most experienced practitioner at the Bar in Company matters. The Report recommends some substantial alterations in the law, and a large number of alterations in detail; but, generally speaking, the Committee have endorsed the current opinion that the system of Company law is working well. The subject is much too large to be covered by the short note to which we must this week confine ourselves, but the Committee report in favour of applying the law of prospectuses to "offers of sale," at least where the offer is made in complicity with the company; they follow to its proper conclusion the result of the *City Equitable Fire Insurance Company's Case* (1925, Ch. 407; 94 L. J., Ch. 445), and propose that directors should not be allowed to shelter themselves under a special clause in the Articles of Association from the consequences of negligence. They also propose that the law should be strengthened with regard to investigation and prosecution of delinquencies of directors and others engaged in company flotation and management, and where, by the issue of debentures or otherwise, the business of the company has been carried on in fraud of creditors. An extension of the registration of a company's mortgages is recommended, so as to include mortgages of ships, and goodwill, and certain other matters; but the Committee shrink from the hindrance to commercial transactions which would follow an extension of registration to all charges on a company's property; and they recommend that further information should be obtainable as to sub-

sidiary companies. In some respects the Report hardly takes a sufficiently strong line, but in general it represents a painstaking and serious attempt to grapple with difficulties which recent experience has disclosed.

—*The Law Journal*, June 12, 1926, p. 508.

The Legality of the General Strike.—The June Reviews are naturally a good deal occupied with the General Strike and its social and legal consequences. The articles by Sir John Marriott in the *Fortnightly*, by Mr. Masterman in the *Contemporary*, and by Mr. Gerald B. Hurst, K. C., M. P., in the *National Review* are all interesting, and as regards its legal aspects they accept the pronouncement of illegality made by Sir John Simon, and promptly followed by the decision of Mr. Justice Astbury to the same effect in *National Sailors', etc., Union* v. *Reed* (*ante*, p. 442). In the *English Review*, however, Dr. David Harrison, the author of "Conspiracy as a Crime and as a Tort in English Law," contests this view, though the result is only to show more clearly the need for an alteration of the law. He refers to the definition of a trade dispute in S. 5 (3) of the Trade Disputes Act, 1906, as, *inter alia*, "a dispute between employers and workmen," the word "workmen" being further defined as "all persons employed in trade or industry, *whether or not in the employment of the employer with whom a trade dispute arises*"; and to the *dictum* of Lord Loreburn, C., in *Conway* v. *Wade* (1909, A. C. 506) that "the section cannot fairly be confined to an act done by a party to the dispute." Hence, argues Dr. Harrison, since there was a genuine trade dispute in the mining industry, the General Strike was, for the purposes of the statute, in furtherance of that dispute, and the Trade Disputes Act protected it from illegality. Even if it did not, yet Dr. Harrison finds no ground for saying that the General Strike involved any one in criminal liability. That is an arguable point, and we have already tried to make our own contribution to the argument (*ante*, p. 428). We have also attempted to point out the amendments which are required at once to make the law clear, and to prevent the recurrence of the late trouble (*ante*, p. 469). That the law requires amendment all the writers, Dr. Harrison included, agree. The only remedy, he says, is "to make the calling of a strike in any vital industry on a national scale a criminal offence." And we may quote Mr. Hurst's concluding words: "Trade Unionism will lose its terrors to society when it

is brought within the law. It will only become peace-loving when all employers become magnanimous."

—*The Law Journal*, June 12, 1926, p. 509.

The Italian Bar.—A decree, promulgated on May 6, regulating the position of the Bar in Italy, has only lately been given to the Press. Barristers and procuratori are free to exercise their profession even when not belonging to the National Syndicates of the Bar. The Councils of the Bar have all been disbanded, and a revision of the Rolls is being undertaken by a special Royal Commission allotted to each judicial college. As no barrister can exercise his profession unless inscribed upon the Rolls, which formerly were regulated by councillors elected by the general assembly and by secret voting, under the new legislation two separate Rolls have now to be drawn up. One will comprise those members of the Bar who do not wish to enter the national syndicates, but whose work in the past has been in accordance with the interests of the nation; the second list will comprise Fascist members of the Bar belonging to the syndicates *de jure*. The chief innovation resulting from this decree will be the restriction of the number of barristers able to exercise their profession.

This new decree was opposed in Parliament and the Senate by Liberals and Democrats as being detrimental to the profession, and they deprecated loss of independence, autonomy and prestige of the professional councils. The speakers, one a henchman of Signor Giolotti, said that the Bar had never been guilty of anti-national work. In reply, the Minister of Justice and framer of the legislation, Signor Rocco, praised the Bar, pointing out that its members had been treated differently from the magistracy, which, comprising civil servants, came under the new bureaucratic law, which enables the Government to dismiss a servant who shows incompatibility with its general political tendency, while members of the Bar are only expected to be "good Italians".

—*The Law Journal*, June 12, 1926, p. 526.

The Constitutional Status of Shadow Cabinets.—Recent events of interest in the political world have called attention to an institution of very recent growth in the development of English Government, namely, the "Shadow Cabinet". This institution appears now to be a recognised feature of every political party when in opposition: both the Labour and Liberal Parties possess specimens of it; but it came into exist-

ence for the first time in 1923, after the resignation of Mr. Baldwin's ministry. The nearest anticipation in earlier history occurred on the accession of Mr. Bonar Law to the leadership of the Unionist Party in 1908, when that statesman invited Mr. F. E. Smith, as he then was, to seat himself on the front Opposition Bench—a place reserved by the customs and traditions of the House of Commons for ex-Ministers. By this action, of course, Mr. Bonar Law treated Mr. F. E. Smith as equivalent in the counsels of his party to an ex-Minister. But it is very often forgotten that, until the accession of Sir Henry Campbell Bannerman to the Premiership in 1905, neither Cabinet nor Premier were technically recognised as existing in English Law. The Premier was merely *primus inter pares* of His Majesty's Ministers and the Cabinet a secret committee of the Privy Council. Sir Henry took the necessary steps to legalise both institutions, and nowadays not only has the Cabinet an official secretary, but Minutes recording its transactions are kept. So unknown to the law was the Cabinet in earlier times that in 1852, on the accession of Lord Derby's Conservative Ministry, Henry Greville—the memorist and a partisan Whig, who filled the office of Clerk to the Privy Council—declined to attend meetings of the Conservative Cabinet, sheltering himself behind the plea that it was no part of his duties to attend an extra-legal meeting of the Privy Council. He, however, compromised by sending a subordinate to explain his views and take his place. According to the tradition recorded in Sir William Fraser's "Disraeli and His Day" Fraser was one of Disraeli's whips), the Cabinet was disposed to raise the legality of his plea by ordering his attendance and dismissing him if he refused, but Lord Derby waived the matter aside by remarking: "When I ring the bell it is all one to me whether the butler answers or sends his footman," or words to that effect. It may be that the Shadow Cabinet has before it a similar gradual growth into actual legal recognition.

—*The Law Journal*, June 19, 1926, p. 528.

Portugal and Poland: *The Rule of Law*.—Recent events in Portugal and Poland, which appeared to have followed the example of Spain, Italy and Russia by establishing military or semi-military dictatorships in place of Parliamentary Government, will recall to the minds of constitutional lawyers one of the most pregnant chapters in the late Professor Dicey's "Law of the Constitution". After explaining the "Rule of Law"

and the "Supremacy of Parliament," Dicey goes on to discuss and regret various suggested limitations on the sovereignty of Parliament which have been suggested at various periods of English history, *e. g.*, the inherent rights of the Royal Prerogative, the fundamental doctrines of the Common Law as embodied in Magna Carta, the fundamental principles of Christian Morality, and the Rights of the Electorate. But the veteran jurist then goes on to point out that, however unlimited in theory, yet in practice the absolute powers of Parliament are in fact subject to two very important checks. These he calls the "Internal Check" and the "External Check" respectively. The "Internal Check" merely means the fact that sooner or later Parliament must be dissolved and an appeal to the Electorate must follow, who will then presumaby undo any action of the Legislature which they strongly disapprove. The "External Check" means the danger of resistance and rebellion if Parliament (or even the majority of the Electorate) attempts to override any stubborn and powerful minority fanatically convinced of the justice of their cause. Dicey and other jurists have pointed out that the theoretically perfect constitution is one in which the Electorate coincides with the physical strength of the nation, so that the internal and external checks act in harmony and not in antagonism. This is usually the case in a Democracy, but there is always the possibility that the numerical majority may consist of persons too unorganised or otherwise feeble to assert their will in the case of resistance by an organised minority. This would appear to be the position in such countries as Russia, Italy, Spain, Portugal and Poland in which representative institutions are a recent innovation and not a slow growth such as they are in England. A theoretical danger of the same kind might conceivably occur in an English-speaking nation if the majority of electors, composed of women, happened to support some attempt to suppress a minority, *e. g.*, trade unionists, composed mainly of men. But the limited feminine franchise introduced in 1918, under which women have two-fifths of the voting power but not an absolute numerical majority, and which appears to correspond on the whole to the respective importance of the sexes in industrial life, would seem to render such a contingency remote.

—*The Law Journal,* June 19, 1926, p. 529.

The Great Libel Case Recalled.—Mr. Artemus Jones, K. C., one of many counsel recruited from the ranks of journalism, was, on Thursday night, made a Bencher of the

Middle Temple. His election recalls that he was the central figure in one of the most notable libel suits of this century, *Jones* v. *Hulton*, arising out of the use of his name as applied to a fictitious person in an article in a Manchester Sunday paper. The case was heard at the Assizes in 1908, and a future Lord Chief Justice, Mr. Gordon Hewart, was junior counsel for Mr. Jones. In the course of the trial it was admitted that the writer of the article had invented the name "Artemus Jones" without any knowledge of there being a living man possessing that name, but it was shown that the real Mr. Artemus Jones had actually been employed by the paper in which the article appeared and was well-known as counsel on the North Wales Circuit. The jury granted the plaintiff £1,750 damages, and the verdict was upheld on appeal to the Court of Appeal and the House of Lords. The case clearly established the principle that the intention of the writer goes for nothing if the libel would make those who read it reasonably infer that the plaintiff was aimed at. As Lord Coleridge, C. J., said in *Gibson and Evans* [(1889) 23 Q. B. D. 386] : " It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff." This dictum was quoted with approval by Lord Shaw in *Hulton* v. *Jones* [(1910) A. C. 26].

—*The Law Journal,* June 19, 1926, p. 529.

BOOK REVIEWS.

CRIMINAL PROCEDURE IN INDIA, by Sir John Woodroffe, M. A., B. C. L. Published by Messrs. Thacker, Spink & Co., Calcutta. Price Rs. 28.

A work of Sir John Woodroffe does not stand in need of any words of commendation from us. Apart from his fame as a Judge and as an author and sanskritist, he has two standard commentaries to his credit and here is a third. It combines—a very rare and difficult thing—brevity with accuracy, fulness and discussion of principles. To economise space, the practice of giving prominent part of one of the names in the cases and giving only one reference the most familiar one has been adopted and some process of selection also has been applied. Madras practitioners would perhaps wish for a larger citation of Madras cases. But with the best of

intentions, it is impossible to avoid a certain amount of local colouring. With all that, there is no doubt that both students and practitioners have been laid under a deep obligation by Sir John Woodroffe by his very valuable and authoritative work.

"TRIAL OF ABRAHAM THORNTON." Edited by Sir John Hall. Notable British Trials Series published by Messrs. Butterworth & Co., Ltd.

It has been one of the cardinal principles of English jurisprudence which every one administering criminal law in the country should ever bear in mind that "it is better that a hundred murderers should escape punishment than that one innocent man should suffer death" and the latest addition to the Notable British Trials Series, giving us the story of the sad death of Mary Ashford and the trial of Abraham Thornton which took place more than 100 years ago under the quaint old English procedure, is a strong illustration of this. The details of the story are quite heart-rending. A country girl of 20, of very attractive appearance, goes to a village ball, dances with the accused till midnight and in the small hours of the morning returns with him to her home, a few miles off. The accused admitted at the trial and even before that he had sexual connection with her but with her consent, and the medical evidence was clear that she was a virgin until the intercourse had taken place. The dead body of the girl was taken out of a pit of water in the neighbourhood early the next morning. Suspicion fell on the accused as the person last seen with her—and in fact he was the first to admit it—and he was charged with the murder based purely on a chain of circumstantial evidence. Local feeling ran high against him but Mr. Justice Holroyd who presided at the trial held the scales evenly for him. The prosecution evidence was to the effect that she was last seen at 4 A. M. blithe and gay, but the accused was able to account for every minute of his morning hours by a number of respectable witnesses. The prosecution story was a violent ravishing of the girl and the ravisher trying to hide his crime by throwing the unconscious girl into a deep pit of water and leaving her to drown. Much was made of traces of footsteps, but the investigation was not scientific and no safeguards had been taken to eliminate mistakes. The jury had no hesitation in finding the man not guilty and the Judge acquitted the accused.

Apart from the pathetic human interest in the story and the element of mystery which still surrounds the death, to the

lawyer the book is of great interest in that it gives him a glimpse of the old English procedure of "appeal of murder" and "wager of battle." Under the procedure then extant, the heir-at-law of the deceased filed an appeal against the acquittal and re-opened the proceedings. When it came on for hearing before Lord Ellenborough, C. J., and three of his puisnes including the trial Judge, the accused exercised the option of waging battle and challenged the appellant to single combat, an option which had never been invoked since the reign of Charles I. Then followed counter-plea, replication, rejoinder, etc., but the plea of waging battle was quite valid under the law and the Court accepted the same. The appellant who was a weak man gave up his appeal at the last moment and the accused was discharged. It was as a result of these proceedings that in 1819 this procedure of "appeal of murder" and the defence of "wager of battle," one of the last remnants of the ancient processes of English Law, was expunged from the Statute Book.

It is unnecessary for us to mention that all the usual features of the Notable British Trials Series are present in this volume. There is the neat historical introduction and the Appendices afford interesting reading containing as they do the forms of the "appeal of murder," the writ of *habeas corpus*, the counter-plea, replication, etc., and a full record of the proceedings in the Appellate Court.

THE LAW OF PLEADINGS IN BRITISH INDIA WITH PRECEDENTS, by P. C. Mogha, Subordinate and Assistant Sessions Judge, United Provinces. Published by Eastern Law House, Calcutta. Price Rs. 9.

This is one of the very few books on the principles and practice of pleadings in this country and we have therefore no hesitation in welcoming it. The art of framing accurate pleadings is, we have regretfully to admit, not so well understood or practised here as it is in England and Mr. Mogha in bringing out his work has placed the legal profession under obligations to him. The book is divided into two parts; the first part consists of 16 Chapters devoted to a full and exhaustive discussion of the principles of pleading with reference to the provisions of the Civil Procedure Code and the case-law on the subject. There is also a chapter on appeals and another on applications and affidavits. Part II gives precedents of different kinds of suits which ordinarily come before the Civil

Courts in this country arranged in alphabetical order according to the various subjects with explanatory footnotes appended to the precedents. There are also some precedent of applications under the Civil Procedure Code and of the other enactments of frequent use in the Civil Courts. We cannot conclude this review without noticing that this book has received the approbation of the Hon'ble Sir Grimwood Mears, the Chief Justice of the Allahabad High Court who has written a short introduction to the book.

THE GUARDIANS AND WARDS ACT, by A. C. Ghose, M. A., B. L., High Court Vakil, Calcutta High Court.

In these pages, the author who has produced many other legal publications has given the Guardians and Wards Act and Indian Majority Act with commentaries and references to all the decided cases noted up to date in appropriate places and under proper headings. The author has not before himself the more ambitious object of discussing and laying down principles on the subject which was achieved by the late Sir Ernest Trevelyan in his treatise in the Law of Hindu Minors, as the author thinks not only that there is no further room for such discussion but that it is unsuited for the matter of fact and workaday life of the present-day Law Courts. There is no doubt that with the multiplicity and frequent conflict of judicial decisions, the discussion of the principles has often gone into the background and we cannot therefore say that this small book noting up the decisions is not without its usefulness to the busy practitioner trying to hunt up cases.

GANATRA'S HAND-BOOK OF CRIMINAL CASES, Vol. IV, 1922-24.

We have great pleasure in acknowledging the receipt of this verbatim reprint of criminal cases from the six series of Indian Law Reports, *i. e.*, Calcutta, Madras, Bombay, Allahabad, Lahore and Patna series for the years 1922 to 1924 with a nominal index of all cases and references to the corresponding pages of the reports and a digest to the rulings.

THE

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RELIGIOUS ENDOWMENTS BILL OF 1926.

FROM the publication of the Religious Endowments Bill of 1926 it is clear that the Government of India is giving sanction for the re-enactment of the Religious Endowments Bill and the ministry of this province intends introducing at the next session of the Legislative Council a re-enacting Bill. We also gather from the newspapers that the Government of India is opposed to a validating bill though not to a re-enacting bill.

The Government of India evidently seems to have taken, if one may say so rightly, the view that a validating enactment as such can be passed only by the Imperial Parliament, that the local Legislative Council, as now constituted, cannot validate a statute, purporting to have been passed by the local Council, whereas a re-enacting bill is in the nature of an introduction of a new measure into the new Council, and, therefore, is within the ambit of the powers of the local Legislative Council. The distinction between a re-enacting and a validating bill is, in the circumstance of this particular case, one of form rather than of substance. For, the re-enacting bill contains a provision validating all the Acts of the Endowment Board, and the whole machinery constituted under the prior Act. If the provision so inserted into the new bill is not to be termed a validating provision, it can only be viewed as a provision giving a retrospective effect of a novel character to a bill which is to be introduced afresh and for the first time. Thus it will be seen that the objections of the Government of India to a validating bill as such are equally applicable to a re-enacting bill with a validating provision.

On the eve of the proceedings connected with the remittal of a bill to the second Council, that is, the present Council, writing in the columns of this Journal* against the legality and

*(1924) 46 M L J 53 (Journal)

the constitutionality of the procedure then adopted the undersigned expressed himself in these terms: "To say the least, the question is not free from doubt and is one of grave constitutional importance, and we have no doubt that His Excellency the Governor, the Chief Minister concerned and the Law Officers of the Crown and the members of the local Legislative Council will give due consideration to the points involved, especially as any irregularity consequent on the non-compliance with the terms of S. 81-A is not likely to be cured by S. 84 of the Act, which validates only certain specific classes of illegalities or irregularities."

Apart from the technical and legal aspect of the question, the constitutional issue underlying the remittal of a bill to a Council other than the Council that passed it was also pointed out in these terms in the columns of this Jounrnal*:"It has been never so much as suggested that the Governor in the exercise of this power could send back a bill to a new Council: in fact, such a thing could not be conceived of in countries where full responsible and party Government obtains. The object of a constitutional statute or the convention of a constitution providing for the cessation of the life of a representative assembly is that the new assembly might reflect the spirit of the nation as a whole for the time being. The duty of a new Assembly is not and cannot be merely to register or reconsider the decrees or decisions or deliberations of a former Council." The Government of this province practically scoffed at and flouted the legal objections then urged to the procedure adopted by His Excellency the Governor, and the ministry followed the extraordinary procedure of debating on the floor of the House the constitutionality and the legality of the procedure adopted, a question depending upon the interpretation of the Government of India Act and the constitutional conventions obtaining in countries governed by representative institutions. The services of their Law Officer, the Advocate-General and the Law Member were utilised for the purpose of arguing the case for the Government before the Council. The Government evidently took the view that the question of legality is to be and could be determined by a vote of the House or the party in power. In spite of protests by the public and a large section of lawyers, His Excellency the Viceroy and the Secretary of State gave their sanction to the Act as passed by the second Council. Since then, the mat-

*(1924) 46 M L J 53 (Journal)

ter has been taken to the highest Court in the land by persons interested in various religious endowments and the question as to the legality of the enactment is pending decision. It is somewhat strange that the ministry, quite sure of its position on the former occasion, should suddenly grow nervous of it, rush up to Simla to get sanction, for a validating or re-enacting bill.

The attitude of the ministry betrays a want of confidence in the highest Court in the land. The objections to an interference with the ordinary procedure in a pending litigation are forcibly pointed out in the columns of the *Hindu* of the 4th August and I do not propose to repeat them. A re-enacting measure, under the present circumstances, is open to serious objections. The Council in re-enacting a measure would have to take upon itself the responsibility of considering the merits of each one of the provisions of the Bill, clause after clause. The party in power did not fight out the elections on the issue of a proposed introduction into the new Council of a legislation regarding Religious Endowments.

The term of the Council is about to expire and the measure proposed is a serious and important one affecting the religious life of the people and a large class of His Majesty's subjects. It is only fair that the verdict of the electorate should be taken at the coming elections on such an important measure and there is no reason disclosed for deviating from the accepted constitutional principle that as far as possible the Legislature should reflect the spirit and temper for the time being of the nation or the electorate. There is no point in any possible argument that may be urged that the measure like the one in contemplation with a view to cure a possible legal defect (if this is the correct view of the measure) should be introduced as soon as possible; for an interval of two or three months is not going to make a great difference.

The Government waited for three years and could well afford to wait a few months longer.

Besides the general considerations above adverted to, I should like to place before my countrymen certain serious defects in the enactment as it stands and as it is proposed to be introduced, which requires thoughtful and conscientious consideration. The defects pointed out will, I trust, demonstrate that it is not a measure to be hurried through, that it is not a measure in regard to the passing of which the various rules as to reading, discussion, etc., of the Bill should be suspended, as

they must inevitably be, if it is to be rushed through at the next session.

In dealing with the defects of the Bill, I do not propose to address myself to any general points of controversy such as the advisability of bringing mutts and religious ascetics and Acharyas under the jurisdiction of lay committees of heterogeneous composition, the extent and limit within which a provincial legislature representing distinct religious persuasions ought to interfere with institutions belonging to a particular sect or community or the necessity of an enactment with a complex machinery for working the provisions of the enactment. I shall confine myself to such defects as appear on the face of the Bill itself.

1. *Application of Endowment Funds* :—One of the chief objections to the Bill is clause 67 of the present re-enactment Bill, which practically abrogates the well-accepted principle of Cypres application of endowment surplus funds though there is a misleading marginal note to the clause indicating that the clause is intended to enact in a statutory form the Cypres doctrine well recognised in English Courts of Equity. The clause as it runs enables the Board to direct the appropriation of temple funds to religious, educational or charitable purposes not inconsistent with the objects of a mutt or a temple. "The doctrine of Cypres with regard to charitable trusts as ordinarily understood is that where a general charitable intention is evinced by a founder, settlor or testator and where he has provided for giving effect to that intention in a particular mode or manner which for some reason or other could not be carried out in exact conformity with the plan or purpose of the person who has provided therefor, the law or the Court will substitute another mode Cypres, viz., as near as possible to the intentions of the founder. But the Court will not abrogate to itself the jurisdiction to divert the funds intended for one purpose to a different purpose. At best it may substitute for a particular charity which has been defined and which has failed, another charity which is *ejusdem generis* and which approaches it in its nature and character. The same principle is applied when the income of the fund either originally or in process of time is or becomes greater than what is necessary for the named purposes in the instrument of foundation, if there is one, or for purposes as gathered from usage."*

*This quotation is from the writer's article which appeared in the *Hindu*, dated 25th December, 1922.

The test is not whether the proposed expenditure is inconsistent with the original purpose but whether it can affirmatively be predicated to be allied to the original objects or purposes. Again under the English Law, a sharp distinction is drawn between what are called religious purposes and what are called charitable purposes. It will therefore be seen that the present clause is a negation of the doctrine of Cypres, not an application of it in spite of the misleading marginal note. How is it possible for any Court to say that a particular educational purpose is inconsistent with the purpose of the foundation? There are staunch students of religion who believe that a man must start with the study of positive sciences,become an agnostic and then ultimately develop true religious beliefs and that it is only then that a religious belief will rest on a solid foundation. Are the temple funds to be utilised for education of that character because according to certain people the ultimate tendency of a particular type of education is to lead a man to religious beliefs, and that such an education is not inconsistent with the purpose of the institution? Again, religious beliefs themselves are of varied character. There may be no necessary inconsistency between the Kshanikavadha and the Buddhist, the Advaitic Philosophy of the Vedantin and the Shakti cult of the idolator. But there is at least as much to be said for the view that the Kshanikavada is sure to sap the foundations of temple worship. It is unnecessary to consider in detail the effect of the study of the sciences upon one's attitude towards temple worship. In a determination of this question care has to be taken not to be led away by the utility of a particular type of education. If I were founding a University I would not exclude from the realm of culture the study of any of these subjects. In fact it is impossible to conceive of a true product of culture without a wide outlook and study of different subjects. But it is one thing to found an ideal University and another thing to utilise temple funds for the development of a particular kind of education, whose ultimate tendency may be to sap the very foundations of temple worship. Again in this connection a distinction has to be drawn between the interference by the State with private benefactions and with its own endowments. There may be something to be said in favour of the view that the State can regulate its endowments in any way it pleases, that it will extend its protection thus far and no further. But the same argument does not apply to private benefactions or endowments by private individuals.

It may be open to the State to permit the perpetuation of a charity or not, but the State will not set before itself the policy of frustrating the intentions of the founder. Again there may be something to be said in favour of special legislation in regard to a particular endowment if the surplus is out of all proportion to the purposes of the original foundation. But there is absolutely no justification for a drastic provision enabling the Charity Board or the Court to divert the application of the funds and for the introduction of a novel doctrine of Cypres of the kind referred to in cl. 67 and after all can it be said that the temple purposes have all been exhausted so as to necessitate drastic legislation enabling the utilisation of funds for charitable and educational purposes as distinguished from religious and temple purposes ? Is it not possible to make some of our places of pilgrimage model cities with due regard to the welfare, the interests and the modern sanitary requirements of the devotees and pilgrims that visit the shrines? Have any definite schemes been placed before the country which show that the temple funds are more than ample for the ceremonial purposes of the temple and for purposes above referred to ? An academic discussion as to the limits of State or legislative interference is not called for. At a particular stage of a country's evolution, the State or Government may say, "We will abolish temples and monasteries" ; but then, the statesmen at the helm of affairs must make bold to say so openly avowing that in the proposed legislation he is truly reflecting the spirit of the nation and of the age, and not attempt at covert or indirect legislation.

2. *Powers of the Local Government under the Act.*— In the earlier stages of responsible Government nothing is more important than to give ample scope for the growth of healthy traditions and conventions. It will not be gainsaid that care has to be taken to see that the ordinary routine and regular machinery of Government is not made an engine of oppression by the party in power or is not made the means of perpetuating its power. We know from our actual experience that the Local Government machinery in the rural areas is used for electioneering purposes and for the purpose of stereotyping of what was originally intended to be a flexible, elastic and responsible party Government. If we briefly survey the provisions of the Act, we see that at every stage the Local Government is made the supreme arbiter of the destinies of an endowment. It can abolish Committees without assigning

any reason ; it can nominate its own men ; it can newly constitute a Committee and put its own men on it. The right of election to a Committee is a precarious one under the Act; for at any time the Government can intervene and abolish an elected Committee without assigning reasons. It introduces new heads of disqualification for Committee membership. An ardent religious soul might be convicted for sedition and sentenced for a few months, but yet is ineligible for election or appointment as a member of a Committee, and the Local Government, which in this case means the ministry or the party in power, is invested with the power to relax the disqualification in any particular case. The question is whether it is in the interests of sound Government a party in power, whichever might be the party, should be invested with plenary and arbitrary power of the kind above referred to, in a country seething with factions. I have no doubt that the answer of most reflective minds would be unhesitatingly, " No ". Again, one would expect that it is for the legislature to say whether the Act shall apply to particular endowments or not. I can even conceive of a power being vested in the Local Government to exempt a particular class of endowments after due enquiry. But, the Bill enables the Local Government to exempt a particular or specific endowment from the operation of the Act without assigning any reasons. Is this a privilege that ought to be accorded to the head of a party machinery? I am not putting the case too high in stating that there may be a tendency on the part of a candidate for election to make an electioneering promise that if he is elected or if a particular party is returned to power, he or the party will see to the exemption of particular endowments from the operation of the Act.

3. *Rules as to the election to Committee Membership.*— Clause 26 enacts that a person shall be disqualified for election as a member of a Committee if at the date of the nomination he is a trustee over whom the Committee has jurisdiction. In its actual working, this provision is practically rendered illusory. It is a notorious fact that in most cases hereditary trusteeship is a family right. In a joint Hindu family though technically the dormant right of trusteeship is in the whole family, the manager is the only person that is entitled to exercise the duties of a trustee, and as such he is the real trustee. There is nothing in the Act or in the Bill as it stands which prevents the nomination or appointment of members of the trustee families other than the trustee. As a matter of practice, this

device was resorted to in certain cases to get over the provisions of the section.

4. *Gross percentage.*—In the history of India, it had been the policy of successive Governments, Hindu and Mahomedan, up to the British Rule, to make large endowments for religious objects and it is repugnant to the ideas of Hindus that the State should intervene and claim a first charge on the gross income of the smallest temple even before the necessaries of the temple are provided for. The Bill brings within its net even temples getting an income of Rs. 250 a year, *i. e.*, a sum of nearly Rs. 20 every month. With the existing prices, a sum of Rs. 20 would be hardly sufficient for the maintenance of the Archaka and the ordinary 'paditharam' of the temple. And yet, this unfortunate temple will have to pay 1½ per cent. of its income to the Board and another 1½ per cent to the Committee.

5. *Jurisdiction of the Board to enquire into questions as to whether a particular endowment is one to which the Act applies or not.*—It is an elementary principle of law that when a Court or body is invested with a limited jurisdiction that Court or body ought not to be made the sole judge on the question as to whether the subject-matter is within its jurisdiction or not. And yet, S. 84 of the Bill makes the Board the sole judge subject only to the order of the Board being revised by an application to the Court. It is somewhat strange that while the Act contains elaborate provisions safeguarding the right of suit, by a trustee, or an aggrieved party, on even sundry matters, the only remedy of an aggrieved party under S. 84 which deals with the question of jurisdiction is a remedy by application. If there is any case in which the remedy by suit has to be safeguarded, it is in this case. The provision practically enables the Board to clutch at jurisdiction.

6. *The class of endowments to which the Act or particular provisions of the Act applies.*

(*a*) *Excepted temples.*—Excepted temple is defined in the Act and in the present re-enacting Bill as follows : "A temple, which before 1801 was and since 1863 continued to be under the sole management of a trustee whose nomination did not vest in, nor was exercised by, the Government, nor was subject to the confirmation of the Government or of any public officer." The evidence in a particular case might point to the fact that an ancient temple founded prior to 1842 was continuously under the management of a particular family since or

subsequent to 1801 and there might be no evidence one way or the other with regard to the condition of things, prior to 1801 and yet, in spite of the fact that the evidence extends over a century, the institution would not be an excepted temple within the meaning of this clause. It is impossible to see the principle behind this definition. If the object of the clause is to differentiate between temples which have for a long time been under private management and other temples, the principle is equally applicable to an institution which was continuously under private management without any intervention by Government since 1801 as to institutions which were so under private management prior to that date. Clause (*b*) of the section draws a distinction between temples founded since 1842 and temples founded prior to that date. Why should temples founded since 1842 be in a better position than a temple founded prior to 1842 and was continuously under private management without intervention by Government?

(*b*) *Kattalais and endowments for purposes of any service or charity connected therewith*:—The definition of religious endowment under the Act is comprehensive and takes in endowments for the performance of any service or charity connected therewith. It is a notorious fact that there are several institutions like choultries and Veda Pātasalas founded by Nattukottai Chetties all over the country. In one sense, they are for the performance of charities connected with the temple, founded as adjuncts to particular temples and mutts. It is far from being clear whether it is the intention of the framers of the Bill to bring in these charities also under the definition of religious endowments. Again, service grants were prior to this enactment treated by Courts on a footing different from the trust property of the temple. But the Bill assimilates the service grants with the trusts of the temple and brings both under the definition of religious endowments. So far as the southern part of this Presidency is concerned, a large part of the Kattalais and benefactions in public temples is traceable to the munificence and religious devotion of the members of the Nattukottai Chetti community and of other private donors. There have been very few instances of the misapplication of these special trusts, and there is absolutely no justification for bringing these special endowments under the jurisdiction of local committees, manned possibly by people who have not contributed anything substantial either to the temple foundation or any endowment connected therewith.

The provisions are sure to give a set-back to the munificence and philanthropy of a large number of people.

From my intimate acquaintance with many of the leading members of the Nattukottai Chetti community, I can confidently say that they resent such an interference. S. 37 of the Act provides that the trustee of a specific endowment is not merely subject to the general superintendence of the trustee (General Trustee) but that he shall obey all lawful orders issued by the General Trustee. There may be something to be said in favour of the co-ordination of the different functionaries of a temple, but that is no reason why the special trustee should be made a kind of subordinate to the General Trustee simply because the special trustee's family seems to be charitably minded and has made large gifts to the temple. It is unnecessary to deal with the point that when once a temple is brought under a particular jurisdiction by reason of the definition all the special endowments are automatically brought under the same jurisdiction.

There are a few of the glaring defects which strike one on a cursory reading of the provisions of the Bill. It is not right, when there are such important questions to be considered, that the legislature should rush through the Bill at the fag-end of its life, suspending all rules of business of the House and of debate. The elected members of the Legislative Council are the trustees and guardians of the people's rights and are not merely the pledged mandatories of this or that party, and they ought, with one voice, in justice to themselves and the electorate, protest against rushing through a measure in regard to which there has been so much of public controversy and agitation. So far as I could gather, the party in power seems to feel, whether justifiably or otherwise, that they are sure of their position at the coming elections. If so, what is the justification for twitting the electorate and rushing through this measure at this juncture? In any event, I trust and hope that the members of the Council will see that appropriate amendments are introduced into the Bill.

A. KRISHNASWAMI.

THE

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THE INDIAN PENAL CODE AND ABSOLUTE PRIVILEGE.

THE Code which has been pronounced to be a marvel in the art of codification and a monument to the legal attainments of Lord Macaulay has left open the much vexed question as to whether the law of absolute privilege applies in India to defamatory statements made by Judges, counsel, witnesses and parties in the course of a judicial trial. Judges of eminence whose legal attainments cannot be gainsaid have held that the authors of the Code never intended to depart from the doctrine of absolute privilege prevailing in the English law. Judges of equal eminence have held a contrary opinion. It would be presumptuous on our part to agree with or dissent from either set. The generality of those who have held the former view have done so on the basis that a doctrine founded on public policy and expediency cannot be presumed to be abrogated by mere silence. The latter proceeding on definite canons of interpretation hold the Code complete and not liable to be added to by any facile reasoning based on public policy. We shall attempt to probe into the intentions. of the authors of the Code with such materials as we have at our disposal, untrammelled by considerations which guide those speaking *ex cathedra*. The question whether the authors of the Code intended to depart from the principles of the English law can best be approached by considering in what other respects the provisions of the Code differ from the English law of defamation.

(*a*) The reason why defamation is made penal in England is because of its tendency to provoke a breach of the peace. The authors of the Code entirely repudiate this doctrine and penalize defamation exclusively on the ground that it tends to injure the individual. Now in departing from a principle, otherwise immaterial, in codified law the authors proceed to support their views in an elaborate note justifying the departure. (Note R.).

(*b*) Again in England a libel alone is made a criminal offence but defamation by spoken words is not penalized. The Code makes no distinction between written and spoken defamation. The authors attempt to justify this departure by very cogent reasoning and conclude: "On the whole we are so far from being able to discover any reason for exempting any mode of defamation that we have not even thought it right to provide different degrees of punishment for different modes of defamation."

(*c*) At the time when the Code was drafted the truth of an imputation could not be pleaded as a defence to an indictment for libel, and if pleaded the Court could not allow evidence of truth to be adduced. But the authors of the Code proposed the first exception to the law of defamation in India thus: "It is not defamation to attempt to cause anything which is true to be believed in any quarter concerning any person." As to this, they observe: "It is opposed to the rules of the English criminal law. It goes, we fear, beyond what even the boldest reformers of English law have proposed." They then devote several pages of close print in support of this reform, mostly based, be it noted, on grounds of public policy and expediency.

It seems clear enough that the authors of the Code had constantly before them the English law of defamation and whenever they thought fit to depart from it they did so after a long and anxious consideration. A perusal of Note R shows further that grounds of public policy and expediency, on which the doctrine of absolute privilege rests, entered largely in the drafting of the law and yet it is true that they do not deal with the question of absolute privilege, nor is there a hint that they had the question before them. It is incredible that if they intended to abolish the privilege in India they should have done so with contempt of silence when alterations of the English law on less important matters were sought to be justified by elaborate reasoning. If the remaining exceptions were intended to dispose of the whole question of privilege absolute and qualified with a conscious desire to abolish absolute privilege in India one would expect something more than the bare remark, "The remaining exceptions will not require so long a defence." We cannot but agree with Sir Arnold White when he observes: "It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English Law with regard to the question of absolute privilege; it seems to

me that in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference." We must respectfully dissent from the criticism of this passage in the latest pronouncement of the Full Bench of the Madras High Court*. The learned Judges say: "We agree with Sir Arnold White, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India." But when on matters of comparatively small moment, we find a departure expressly mentioned and justified, it is not easy to infer an intention to abolish the doctrine of absolute privilege which in every country is one of supreme consequence to those discharging public functions, by a provoking silence. The question, however, does not rest on mere inference.

The spirit with which the drafting of the Code was undertaken may well be judged from the following remarks : " We are perfectly aware of the value of that sanction which long prescription and national feeling give to institutions. We are perfectly well aware that law-givers ought not to disregard even the unreasonable prejudices of those for whom they legislate." Remembering that the Code was intended to govern even the Englishman to whom the defence of absolute privilege would be more necessary in those days than to the Indian it seems incredible that men steeped in the constitutional doctrines of their country should have intended to abrogate that privilege without a word of justification.

Two propositions seem to us, however, indisputable. First that the Code was meant to embody the whole Penal Law of the country,and secondly, that the defence of absolute privilege, as it is understood to-day, does not find a place in the Code. It is this apparent contradiction between the intention and execution that is at the root of the opposing views on the question. Those who have seen the intention have denied the completeness of the execution. Those who have seen the execution to be complete have denied the intention. The solution lies in reconciling both and it will be found in an inquiry as to how the doctrine of absolute privilege was understood in England up to the time of *Munster* v. *Lamb* in 1883 (1).

*(1926) 51 M L J 112 (F B). 1. (1883) 11 Q B D 588.

Any one perusing the report of the argument of counsel for plaintiff will find authorities quoted in support of both absolute and qualified privilege but the state of the law is well summarised by Brett, M. R. thus: "But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are Judges, parties and witnesses who make statements without malice and relevancy; and that those Judges, parties and witnesses, who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. *I am inclined to think that with regard to these classes of persons the law has not been always stated in the same manner by the Judges, and some Judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other Judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted.*" He then refers to *Revis* v. *Smith* (2) and to *Henderson* v. *Broomhead* (3) as having settled the law of absolute privilege regarding witnesses, and to *Scott* v. *Stansfield* (4) as to Judges. As to counsel, the decision from which we have quoted was itself the first that settled the question of absolute privilege. If such was the state of authorities in England it is very probable that the authors of the draft in 1837 and of the second report in 1843 did not think that the privilege of those connected with proceedings in a Court of law extended in England beyond the provision in the Code.

The probability thus alluded to is confirmed by what the Commissioners say in their Second Report, para. 405 : "The exceptions from the 5th to the 9th appear to be embraced in articles 11 and 14 of Chap. XVI of the Digest of the English Criminal Law Commissioners in which are described the publications that are held to be "*justifiable either absolutely or in a qualified manner in respect of the occasion.*" Art. 14 would seem also to cover the 2nd and 3rd exceptions as it justifies publications made *bona fide* for the benefit of any party or of the public or with a view to the discussion of any acts, measures or proceedings affecting the public or otherwise howsoever any party of the public having an interest in the making or receiving of such communications."

We regret we have not been able to procure the Digest referred to for comparing the provisions in the two Codes, but

2. (1856) 25 L J C P 195.
3. (1859) 28 L J Ex 360. 4. (1868) 37 L J Ex 155.

the above excerpt of the report seems fairly to indicate that the Commissioners thought they were providing for cases of *absolute privilege* as it then was in England, as well as that they did not intend to provide a different law for India.

It may be of interest to note one other point leading to the same conclusion. When the draft of the Code was circulated for opinion there was no stronger opponent of the bill than Mr. Norton, the then Advocate-General of Madras, and he does not appear to have thought that the provisions of the Code regarding privilege fell short of the doctrine of Absolute privilege in the English Law. The High Court of Madras is, however, of opinion that Judges are protected by the provisions of S. 77, Indian Penal Code. That section in our view provides for acts done with or without jurisdiction or in excess of jurisdiction, acts such as arrest, imprisonment, malicious prosecution, etc. Such a provision, though not equally wide, finds a place in the English Law quite apart from the doctrine of absolute privilege as applied to the law of defamation. It would indeed be strange if a Judge were to allege as a defence to a charge of defamation that the law empowered him to defame another or that he *bona fide* believed he was so empowered. The law authorizes nobody to defame another but tolerates such a defamation in a Judge discharging judicial functions in the higher interests of the public. The illustration to Exception 7 shows that Judges are no more immune than anybody else connected with proceedings in a Court of law.

The foregoing investigation into the intentions of the authors of the Indian Penal Code ought to induce the legislature to no longer delay a reform which is long overdue.

In carrying out this reform the legislature will be carrying out the intentions of the authors of the Code who fully anticipated that such defects would be discoverable in the course of time. In recommending the acceptance of the Code to the Governor-General the Commissioners say: "Sometimes it will be found that a case has arisen respecting which the Code is silent: in such a case it will be proper to supply the omission. Sometimes it may be found that the Code is inconsistent with itself: if so, the inconsistency ought to be removed. Sometimes it will be found that the words of the law are not sufficiently precise: in such a case it will be proper to substitute others. Sometimes it will be found that the language of the law, though it is as precise as the language admits, is not so clear that a person of ordinary intelligence can see its whole meaning: in these cases it will be expedient to add illustrations,

such as may distinctly show in what sense the legislature intends the law to be understood, and may render it impossible that the same question, or any similar question, should ever again occasion difference of opinion. In this manner every successive addition of the Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding. Important questions, particularly about which Courts of the highest rank have pronounced opposite decisions, ought to be settled without delay; and no point ought to continue to be a doubtful point more than three or four years after it has been mooted in a Court of justice." The length of time since the question of absolute privilege was first mooted in the High Courts in India ought to induce the legislature to delay no longer in declaring either that they do not intend to alter the Code as the public policy and expediency which dictated the privilege is different in India, or that they are prepared to modify the law so as to bring it into conformity with the law in England.

The inconvenience of the present state of the law has been felt by all the High Courts but instead of recommending an alteration of the law the High Courts of Bombay and Burma have sought to modify its rigors by declaring that complaints ought to be thrown out unless the complainant makes out a *prima facie* case of malice. But this is to ignore the provisions of S. 105 of the Evidence Act which expressly throws the burden on the accused to prove *bona fides*, in the first instance. See *Queen-Empress* v. *Balkrishna Vithal* (5) (Fulton, *J.*).

Apart from the question of absolute privilege, we think it important that the law of qualified privilege should in no respect be different from that prevailing in England, where if the occasion is privileged the burden of proving malice is on the complainant. On this point too it is clear that the authors of the Code did not intend to modify the English Law for they say: "The burden of proof will sometimes lie on the person who has made the imputation and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down." But the Evidence Act throws the burden in all cases on the accused and does not permit of any exceptions.

MADRAS. F. S. VAZ.

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5. (1893) I L R 17 B 573.

CUDDALORE, N. T.,
9th August, 1926.

To

THE EDITOR,
"THE MADRAS LAW JOURNAL,"
MADRAS.

SIR,

Last week's *Fort St. George Gazette* publishes the notification relating to the increase of pecuniary jurisdiction for the Judges of Courts of Small Causes for the trial of suits cognizable by such Courts up to the amount of Rs. 1,000. In that connection there is one point which does not appear to have been considered when Madras Civil Courts Act was sought to be amended by Act 18 of 1926 so far as the court-fee payable in respect of small cause suits up to Rs. 500 was concerned. The Court Fees Madras Amendment Act provided a scale lower than the court-fees payable for a original suit up to that amount. When the pecuniary jurisdiction was raised to Rs. 1,000 one would have expected that the legislature would have introduced a corresponding modification in Sch. I, No. 2 which prescribes the fee payable by altering Rs. 500 that occurs in that number to Rs. 1,000. Inasmuch as that has not been done, the question now arises whether in respect of claims in small cause suits for amounts going beyond Rs. 500 but up to Rs. 1,000 Court-fees have to be paid on the higher scale or on the lower scale. In the absence of an amendment to the Court Fees Act, the Courts will necessarily insist upon the payment of Court-fee on higher scale either on the excess amount or the entire amount. The principle underlying the payment of Court-fee on the lower scale for small cause suits up to Rs. 500 equally applies to such suits when the subject-matter does not exceed Rs. 1,000. It behoves the legislature therefore to bring about an amendment by altering "Rs. 500" to "Rs. 1,000" in the relevant number of the schedule referred to above, so that this hardship may be very soon removed.

Another point that arises in this connection is the payment of Vakils' fee for a small cause suit especially when the subject-matter may run up to Rs. 1,000. Rule 289 of the Civil Rules of Practice prescribes Rs. 5 as the fee recoverable by the party employing a pleader in suits under the Madras Provincial Small Cause Courts Act and Rs. 15 and 10 respectively for Advocates and Vakils who appear in such cases where

the judgment certifies accordingly. Even when the limit of Rs. 500 was in force this scale of fee was considered to be excessively moderate but now when the subject-matter is increased to Rs. 1,000 there is hardly any reason why the rule should continue as it is instead of suitable amendments being made to that rule so as to raise the amount at least to Rs. 35 or 50 as the case may be.

It is the earnest desire of the members of the Bar that suitable amendments to carry out the aforesaid objects may be introduced so as to obviate the inconveniences arising out of the altered situation.

R. KRISHNASWAMI AIYANGAR,
Vakil, Cuddalore.

SUMMARY OF ENGLISH CASES

HOWELLS *v.* POWELL DUFFRYN STEAM COAL CO., LTD., (1926) 1 K. B. 472.

Workmen's Compensation Act—Accident—Arising out of and in the course of employment—Coach provided by employer for use of miners—Option to use—Liability for accident.

In a colliery the miners had to travel a distance of one mile up a mountain and to facilitate doing the journey the employer had provided a coach which would be dragged up the incline for the use of the miners. There was no obligation on the miners to use the coach, but they could do it if they liked. A miner lad coming for work travelled by the coach one day and while the coach was being dragged up the incline suffered injuries due to an accident, for which he claimed compensation. *Held,* he must be deemed to have entered on his employment as soon as he reached the premises and as the accident arose in the course of employment was entitled to compensation.

BROWNING *v.* CRUMLIN VALLEY COLLIERIES, LTD., (1926) 1 K. B. 522.

Contract—Mining service—Implied terms—Mine unsafe—Refusal of miners to work—Mine closed for repairs—Miner if entitled to wages.

Certain miners who were employed in a colliery found the shafts unsafe and refused to work till they had been made safe. The owners found on inspection that the shafts had become unsafe on account of natural decay and not due to any

negligence on their part and closed the mine while repairs were being carried on. The miners claimed a declaration that they were entitled to wages even during the period of non-service. *Held*, under the circumstances it must be taken to be an implied term of the contract of service that the owners would not be liable to pay wages during the period reasonably required to repair the shaft. Case-law referred to.

COHEN *v.* SELLAR, (1926) 1 K. B. 536.

Contract of marriage—Engagement ring—Marriage broken off—Return of ring.

An engagement ring is a conditional gift which is given as a token of marriage. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So on the other hand if the man has, without a recognised legal justification, refused to carry out his promise of marriage he cannot demand the return of the engagement ring.

Semble : If the engagement to marry be dissolved by mutual consent, then in the absence of a contract to the contrary the engagement ring and like gifts must be returned by each party to the other. If the marriage does not take place through either the death of, or through a disability recognised by law on the part of the person giving the ring or other conditional gift, a condition will be implied that the gift shall be returned. If the marriage actually takes place, then the engagement ring or like gift will, in the absence of an express agreement to the contrary, become the absolute property of the recipient and that property will not be divested by subsequent divorce.

Case-law discussed.

MARTIN *v.* LOWRY, (1926) 1 K. B. 550 : 95 L. J. K. B. 497.

Income-tax—Trade or business—Machinery merchant purchasing huge stock of linen—Disposal by sale within a few month—If amounts to trade or business—Annual gain—Meaning of—Income-tax Act, 1918, *Sch. D.*

A merchant engaged in the business of wholesale machinery purchased 45 million yards of the surplus stock of Government aircraft linen, under an agreement to pay for and take delivery within six months. He wanted to dispose it of in one sale, but failing to do so, he set up a large and skilled organisation for selling it in smaller quantities and within a period of seven months was able to dispose of the whole stock. He was sought to be made liable for Excess Profits Duty and

income-tax with respect to his profits. *Held*, by the Court of Appeal affirming Rowlatt, J., (1) he was carrying on a trade or business for the purpose of making profits and as such was assessable to Excess Profits Duty ; and (2) though the transaction was completed within seven months, his earnings amounted to " annual profits or gains " within the meaning of Sch. D (*a*) of the Income-Tax Act, 1918, and as such was assessable to income-tax. The word " annual " means only in the current year, occurring in the year of the assessment to taxation and does not imply an element of permanence resulting in the production of recurrent annual profits.

REED *v.* SEYMOUR, (1926) 1 K. B. 588.

Income-tax—Profits or gains—Benefit match for professional cricketeer—Gate money—Nature of—If assessable to tax.

A professional cricketeer of the Kent County Club was given a benefit match and the gate moneys invested by the trustees of the Club in some securities and the income paid to the cricketeer. On his retiring from the profession of an active cricketeer, the trustees of the club utilised the collections to purchase a farm for him. The question arose whether he was liable to pay income-tax. *Held*, the moneys did not represent an income, profit or gain, but a donation or a testimonial of an exceptional kind or a mere present and as such it was not assessable to income-tax.

METROPOLITAN TUNNEL AND PUBLIC WORKS, LTD. *v.* LONDON ELECTRIC RAILWAY COMPANY, (1926) 1 Ch. 371 : 95 L. J. Ch. 246.

Arbitration—Agreement to refer—Construction of contract—Question of law—Stay of proceedings—Arbitration Act, 1889, *S.* 4.

An agreement to carry on a railway construction containted a schedule of the prices to be paid for the various items of work, with an addition of "10 per cent. for general contingencies ". Every month payment was to be made for the work done and there was a clause for reference to an Engineer arbitrator questions relating to the construction or meaning of the contract. The question arose whether the monthly payments should also include the additional " 10 per cent. for contingencies ". The plaintiffs took an originating summons for construction of the agreement, whereupon the other party applied under S. 4 of the Arbitration Act for stay of proceedings. *Held*, by a majority of the Court of Appeal (Lord

Hanworth, M. R. and Scrutton, L. J., Sargant, L. J. dissenting) the onus was primarily on the plaintiffs to satisfy the Court that there were good grounds for not referring matters to arbitration and the matter being one relating to the technical meaning of the expression " general contingencies, " the question was not one of law for the Court to decide but for an Engineer arbitrator to decide under the terms of the agreement.

BOOTH *v.* THOMAS, (1926) 1 Ch. 397 : 95 L. J. Ch. 160.

Landlord and tenant—Lease of land—Landlord owner of adjoining land—Stream confined in culvert—Omission to repair culvert—Damage caused to lessee—Breach of covenant —Liability.

A natural stream ran through a piece of land and was enclosed by him in a culvert. He leased the adjoining piece of land on which some buildings stood, with the usual covenant for quiet enjoyment. The culvert was never kept in proper repair and as the result of a storm, the stream broke through the side of the culvert and washed away the slag on which a wall of the demised building rested, and the wall collapsed. The person in whom the lease then vested sued the then owner of the neighbouring land for damages. *Held,* by the Court of Appeal, the latter was liable as there was a breach of the covenant for quiet enjoyment. Just like an act of commission, the omission to keep the culvert in repair amounts to a breach of duty to a neighbouring landowner.

In re AUTOMATIC BOTTLE MAKERS, LTD. : OSBORNE *v.* AUTOMATIC BOTTLE MAKERS, LTD., (1926) 1 Ch. 412 : 95 L. J. Ch. 185.

Company—Debentures—General floating charge—Trust deed authorising issue of further charges " in ordinary course of business"—Second floating charge on specified assets—Validity of.

A company under the terms of a trust deed issued a series of debentures, creating a general floating charge on all its assets, but the deed reserved power to create in priority to such charge, such mortgages or charges for the purpose of raising moneys in the ordinary course of business by the deposit of " dock warrants, bills of lading, materials, products and stock. " Acting under this reserved power, the company raised another loan charging the abovementioned items but entitled to rank in priority to the prior floating charge created under the trust deed. *Held,* by the Court of Appeal the

second charge was valid and was entitled to priority over the first.

Per Warrington, L. J.—By creating a charge upon its assets generally by way of floating security, a company is not, in the absence of any stipulation to the contrary, prohibited from creating specific charges on specific portions of its assets in the ordinary course of business. There is no authority for the proposition that no floating charge, though upon a part only of the assets, would be allowed under the general law after creating a prior general floating charge on all its assets, both present and future.

MELZAK *v.* LILIENFELD, (1926) 1 Ch. 480.

Lease—Sub-lease by lessee—Covenants contained in, if incorporated—Sub-lease to contain only usual covenants—Breach of contract—Damages.

A professional musician agreed in writing to take an underlease from the defendants. He had no opportunity to know the terms of the lease to the defendants and when the latter knew that the premises would be used to give lessons in music, they refused to let the premises. *Held*, in an action for specific performance and damages, the musician was entitled to a sub-lease containing only the usual covenants and is not bound to accept one with the special restrictive covenants which may be contained in the head lease.

Although generally speaking if a purchaser has notice of a particular document he must be taken to have notice of its contents, yet in a contract for the sale of a lease or the grant of a sub-lease out of a leasehold interest, in each of which cases the proposed grantee has notice of the lease, the law is that in the absence of any term in the contract to the contrary, and in the absence of any evidence that the proposed grantee has in fact been made acquainted with the actual terms of the lease, the contract must be read and construed as in the one case a contract for the assignment of a lease containing the usual covenants, and in the other case, as a contract for the grant of a sub-lease out of a leasehold interest containing the usual covenants.

In re BLYTH SHIPBUILDING AND DRY DOCKS CO., LTD : FOSTER *v.* BLYTH SHIPBUILDING AND DRY DOCKS CO., LTD., (1926) 1 Ch. 494.

Sale of goods—Agreement to build ship—Payment by instalments—Ship partly constructed—Property when passes—Sale of Goods Act, 1893, *Ss.* 16, 18.

A contract to build a ship provided for payment of the price in instalments at fixed intervals according to the various stages of the construction. There was a clause in the agreement which provided that after the payment of the first instalment, "the vessel and all materials and things appropriated for her" should remain the absolute property of the buyer, subject to the vendor's lien for unpaid purchase money. The vessel had been partly constructed and some of the instalments paid, when at the instance of certain debenture holders of the shipbuilding company the question was raised in whom the property vested at that time. *Held,* by the Court of Appeal affirming the decision of Romer, J. the property in the uncompleted ship had passed to the buyers, but not the materials not actually built into the vessel. Meaning of the word "appropriated" discussed.

GREGG *v.* RICHARDS, (1926) 1 Ch. 521 : 95 L. J. Ch. 209.

Right of way—Sale of land—Body of document reciting right over a portion—Statement of right in habendum *as then existing—What passes.*

A sale deed contained a recital of the grant of a right of way described as coloured green on the attached plan. According to the plan this was four feet wide and formed only part of a wide roadway. Up to that time the vendor himself was enjoying a right of access over the whole width of the road and the ***habendum*** contained a general clause that all rights of easement then enjoyed by the vendor should pass to the vendee. The vendee claimed a right of way over the whole width of the road. *Held,* by the Court of Appeal reversing the decision of Russel, J. in (1926) 1 Ch. 102 the definite language of the ***habendum*** prevailed over the ambiguous description in the body, as limited by the plan and the vendee had a right of way over the whole road.

Per Pollock, M. R.—The maxim *expressio unicus exclusio alterius* is not a rule of law but only a canon of construction to be applied with great caution.

WILSONS AND CLYDE COAL COMPANY *v.* M'FERRIN, (1926) A. C. 377 : 95 L. J. P. C. 130.

Workmen's compensation—Arising out of and in the course of employment—Breach of statutory or other regulation—Act done for purposes of and in connection with employer's business—Liability—Workmen's Compensation Act, 1923, S. 7.

A workman who has arrogated to himself duties which he was neither engaged nor entitled to perform, whether the act which causes the injury is the subject of specific prohibition or not, is not entitled to compensation for injuries sustained while he is performing those duties, as S. 7 of the Workmen's Compensation Act, 1923, does not apply to such a case.

COMMISSIONERS OF INLAND REVENUE *v.* FISHER'S EXECUTORS, (1926) A. C. 395 : 95 L. J. K. B. 487.

Income—Supertax—Profits of company distributed to shareholders as debenture stock—Capital or income—Finance Act, 1910, *S.* 66.

A company which had earned large profits decided to distribute a part of it to its shareholders in the form of an issue of debenture stock to them and it was so done. On a question arising whether the shareholders were assessable to supertax upon it, *held*, by the House of Lords affirming the decision of the Court of Appeal in (1925) 1 K. B. 451 such stock was not income in their hands for purposes of assessment, but really an accretion to their capital. *Inland Revenue Commissioners* v. *Blott*, (1921) 2 A. C. 171 followed.

KIMBER COAL CO., LTD. *v.* STONE AND ROLFE, LTD., (1926) A. C. 414.

Shipping—Charterparty—Principal and agent—Signature by agent for named charterer—Demurrage to be paid by agent—Personal liability.

A contract of charterparty was entered into by the owner of a vessel with A. B. Co. described as the charterers. The contract was made in a printed form and the body of the form provided for demurrage being paid by the charterers. At the end in manuscript was added a clause that freight and demurrage would be paid at Glasgow by the Kimber Coal Co. and the charterparty was signed "For the A. B. Co., X of the Kimber Coal Co." The owners sued the Kimber Coal Company for demurrage. *Held,* the signature clearly indicated that the charterers were the A. B. Co., and the signatories were acting only as agents and hence the latter were not personally liable. The presumption arising from the form of the signature was not rebutted by the manuscript clause which only meant that the Kimber Coal Company as agents would pay.

MACLAINE AND CO. *v.* ECCOTT, (1926) A. C. 424.

Income-tax—Foreign firm—Exercising trade or profession within the United Kingdom—What amounts to—Agent arranging sales—Effect of.

In the case of a merchant's business, the primary object of which is to sell goods at a profit the trade is, speaking generally, carried on at the place where the contracts are made. In certain circumstances a reference to the place where payment is made for the goods sold or to the place where goods are delivered is a material consideration in deciding whether trade is carried on at a particular place. But the most important or crucial question is, where are the contracts of sale made ?

A Java firm having agents in London who arrange sales either directly or through brokers must be considered to exercise a trade within the United Kingdom within the meaning of the Income-tax Acts even though the goods are sent from Java direct to the purchasers wherever they may happen to be, and the price is sent to the firm at Java directly. But profits made on sales by the Java firm to non-resident persons, and which were not received by the agents in London are not liable to taxation.

ATTORNEY-GENERAL FOR ALBERTA *v.* COOK, (1926) A. C. 444 : 95 L. J. P. C. 102.

Divorce—Domicil—Decree for judicial separation—Effect of—New domicil of wife—Jurisdiction to grant divorce.

Under the English Law, so long as the married status continues the domicil of the wife is that of her husband. By obtaining a decree for judicial separation, a wife cannot acquire a domicil of choice apart from that of her husband and cannot in a Court of such domicil sue for divorce. Case-law elaborately discussed.

HIRJI MULJI *v.* CHEONG YUE STEAMSHIP CO., LTD., (1926) A. C. 497 : 95 L. J. P. C. 121.

Arbitration—Charterparty—Submission of disputes—Frustration of adventure—Effect of, on charterparty—Jurisdiction.

Under the terms of a charterparty a ship was chartered on certain terms for a period of ten months and it contained a clause for submitting to arbitration disputes arising out of the contract. During the term of the contract, the vessel was requisitioned by the Government and released only two years later. The charterer thereupon refused to take delivery of the vessel for the unexpired period of the term and the shipowner claimed to proceed under the arbitration clause. *Held*, the charterparty had come to an end as the result of the frustration of adventure caused by the Government requisition,

and there was no jurisdiction to refer any matter to arbitration.

HOYSTEAD *v.* TAXATION COMMISSIONER, 95 L. J. P. C. 79.

Estoppel by judgment—Admission of fact—Effect of.

The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact. The same principle applies not only to an erroneous admission of a fundamental fact but to an erroneous assumption regarding the legal quality of that fact.

In re ARMSTRONG : *Ex parte* LIPTON, 95 L. J. Ch. 184.

Bankruptcy—Trustee—Power to reject proof of debt by money-lender—Harsh and unconscionable bargain.

A trustee in bankruptcy has no power to reject proof of a debt given by a money-lender on the ground that the contract amounts to a harsh and unconscionable bargain. Such a power is vested in the Court alone.

In re A DEBTOR : *Ex parte* NEWBURYS, LTD., 95 L. J. Ch. 199.

Bankruptcy—Deed of assignment—Creditors asking for particulars of trustee—Standing by—Acquiescence—Bankruptcy Act, 1914, *S.* 1 (1) (*a*).

Where certain creditors on hearing of a deed of assignment executed by their debtor sent their clerk to the trustee for information of the particulars of the deed and sent in a statement of their claim, and some days after put in a petition for adjudication relying on the execution of the assignment deed as an act of bankruptcy, *held,* their delay amounted to acquiescence and they were estopped from relying on the deed as an act of bankruptcy.

JOTTINGS AND CUTTINGS.

The Budget.—There is comparatively little in the Budget of special legal interest. The proposed betting tax is a means of making the less wise—to put it mildly—contribute to the necessities of the wise. Whether it is a tax on a vice or a luxury we need not explore. Plenty will be said about it on both sides before the tax materialises, and however widespread betting may be, there are many to whom even Sir John Simon's half-crown on his golf makes no appeal. If we were

to profess pleasure at the "Raid on the Road Fund" we should lay ourselves open to rebuke from our vigilant motorist correspondents; but a levy of a few millions is a small compensation for the danger and nuisance which motoring causes as now carried on—to a large extent unlawfully, but without substantial check either from the authorities or their own Associations. Income-tax remains steady, and will do so until some at present unforeseen event occurs. Safeguarding and other protective duties are not our concern.

—*The Law Journal,* May 1, 1926, p. 396.

The Three Years' Average.—The question of the three years' average may also be regarded as of legal interest. The Chancellor of the Exchequer said that its abolition was desired by the majority of the tax-payers, and he intimated that this would be effected next year. That it is desired by tax-payers generally we doubt. That it is opposed to the wishes of traders is evident from the proceedings of the Association of British Chambers of Commerce last week, when, as reported in the *Times* of the 23rd ult., a motion to substitute a year-to-year system, based on the profits of the preceding year, was defeated by 181 to 55. No doubt, as Mr. Churchill said in his Budget speech, the Royal Commission on the Income-tax strongly recommended that the change should be made. To use their own words, they had "no hesitation in recommending it," and they gave three reasons, one being that "it seems to be almost universally desired" (*Report,* p. 105). This appears to have been a mistake. The arguments for and against the three years' system were very impartially put by Sir Edward Harrison, then Assistant Secretary to the Board of Inland Revenue, in his evidence before the Commission (Fifth Instalment of Minutes of Evidence, p. 755 *et seq.*). The chief argument in favour of a change is that the assessment is brought nearer to the actual profit, and that it will facilitate unification of the various bases of assessment; the argument against is that the three years' average produces steadier results both for the tax-payer and the Exchequer. As a matter of account, the average system should be as simple as the one-year system. No doubt the matter will be fully considered before a change is made.

—*The Law Journal,* May 1, 1926, page 397.

Famous Budgets of Recent Years.—The name of Sir William Harcourt, of course, recalls the epoch-making Budget of 1894, which, for good or for evil, introduced into our fiscal

system, not indeed Death, which according to John Milton was introduced into the world by Sin, but one of the appendages of mortality, namely, Death Duties. Rates, of course, have been increased and provisions relating to Compound Settlements altered, but otherwise the main features of Harcourt's great Budget still subsist to-day, and have been a leading cause of the break-up of the great landed estates and their gradual transmission into the hands of the tenants as purchasers subject to mortgage which is so marked to-day. Mr. Asquith it was who introduced the super-tax, and for the first time distinguished between earned and unearned income for the purposes of taxation. Mr. Lloyd George's experiments in the taxation of land, since abandoned, are well known; but memories are short, and it may be useful to remind some readers that his land taxes were three in number: increment value duty; a tax on undeveloped land; a tax on reversions of leasehold property. Mr. McKenna introduced no novel taxes, but he gained a great reputation by the skill with which he adjusted the issue of Treasury bills to the market conditions: for current expenditure is met by the issue of short dated Treasury bills, which are paid usually in the last quarter of the fiscal year out of the revenue which then flows in. Sir Robert Horne's great merit as a Chancellor was his steady effort to secure the reduction of inflation and the return to the gold standard, a course to which he steadfastly adhered—to the ultimate great advantage of our national credit—notwithstanding much severe criticism of his patient economic orthodoxy in brilliant, but unsound, quarters of the Press.

—*The Law Journal*, May 1, 1926, page 397.

Professional Rewards.—The writer of a letter which appeared in *The Times* of April 29 stated that in a recent case a distinguished surgeon performed a difficult operation, and saw the patient either at his consulting room or at the nursing home some twenty-six times, for a total fee, including anæsthetist and assistant, of 165 guineas. He contrasts this with an action in the Courts which lasted half a day, and in which the fee to "a distinguished K. C." was 500 guineas, with corresponding fees to junior counsel. "These fees," says the writer, "relate to the hearing of the case only. The preliminary work was paid for separately." He goes on to ask whether it is surprising, "in view of their relative rewards, that medicine is a developing profession and the Bar one that is being increasingly dispensed with. Is it surprising that every medical student has a reasonable prospect of making a living, while

at the present moment there are literally hundreds of barristers who are unable to make a living in the Courts?" There are very many comments which might be made upon such a letter as this, but the real answer is, of course, that the two cases are not comparable at all. Such a statement as that the "preliminary work" of the leader was paid for separately, and was not included in the brief fee, is only an example of the points which show that the writer of the letter has an imperfect knowledge of the way in which the work of counsel is remunerated, whilst the fact, which is presumably considered of great importance, that the case lasted only half a day, is, of course, altogether beside the point. We cannot deal here with all the matters of interest which an attempt to compare the professional rewards of the surgeon and the lawyer raises, but we are astonished to learn that, in the opinion of a writer who signs himself "Professional Man," "the profession of the Bar is being increasingly dispensed with." That many men are called to the Bar who never intend to practise is well known, although the number of such is less than it used to be; but it is, we think, the experience of those best competent to judge that the proportion of members of the Bar who desire to make a living by the practice of their profession, and who fail, is little—if at all—greater than that of the members of other professions.

—*The Law Journal,* May 22, 1926, page 426.

Sir Thomas Erskine Holland.—The death of Sir Thomas Erskine Holland, at the age of 90, removes a figure which has long been conspicuous in the world of Jurisprudence. After gaining a fellowship at Exeter College, Oxford, he had a short experience of actual practice at Lincoln's Inn, and on the Home Circuit, but returned to his University, and in 1874 was appointed to the Chichele Professorship of International Law, a position which he held for thirty-six years, retiring in 1910. His pursuit of this subject was not merely academical. Various practical aspects of it were dealt with in the papers which he collected and published as "Essays on International Law" and he appealed to a wider public in his frequent letters to the *Times.* These were re-published as "Letters on War and Neutrality," and the third edition (1921) includes many letters written during and after the war. Thus he strongly advocated the separation of the League of Nations Covenant from the rest of the Treaty of Versailles, though it seems that President Wilson's only chance of getting the Covenant was to make it a *sine qua non* of the Treaty. Prof. Holland also rendered

important assistance to the Government in preparing a statement of the "Laws and Customs of War on Land." But he was better known to students of law by his "Elements of Jurisprudence," first published in 1880, and issued in the thirteenth edition in 1924. With a formidable rival in the late Sir John Salmond's Jurisprudence, which appeared some twenty-two years later, it has nevertheless deservedly maintained its reputation as a masterly investigation of the basis of law and of the nature and relations of legal rights. While not so hostile to Austin as some other modern jurists, Holland developed the practical side of his subject in a way Austin had never attempted. But he had far better materials on which to work. He knew his Savigny and Ihering, those great German jurists; his way was prepared by Maine and Holmes and Maitland, and—the sole survivor of a great group of legal explorers—Sir Frederick Pollock; and, wherever possible, the abstract principles which he taught were illustrated by reported decisions of the Courts. Prof. Holland's contributions to the science of law were great and valuable, and in their own sphere perhaps as noteworthy as the forensic successes of Lord Chancellor Erskine, whose great grandson through Erskine's eldest daughter, he was.

—*The Law Journal,* May 29, 1926, page 466.

Constitutional Theory and the Hertzog Claim.—In a recent speech in the South African Parliament an interesting pronouncement on Constitutional Theory, as understood in South Africa, was made by the Union Premier, General Hertzog. He claimed that ever since the Treaty of Versailles, which the self-governing Dominions signed as separate international entities, and which was followed by the allotment to them of independent national representation in the Assembly of the League of Nations, each of the British Dominions is, in International Law, an independent Sovereign State connected with the mother-country only by the fact that the Monarch of the United Kingdom is also King of Canada, Australia, New Zealand, Newfoundland, Rhodesia and the Union of South Africa. In other words, he claimed for the Dominions the same status as was possessed by Scotland between the Union of the Crown in 1603 and the Union of the Parliaments in 1707. If this theory were correct, the Imperial Parliament would have no legal powers to legislate for a Dominion—except so far as the Constitution of the Dominion confers or retains such rights—but the King and the Judicial Committee would still retain all their existing legal rights unless

and until the Dominion Parliament (with the Royal Assent) altered or abrogated these. That is practically the same claim which was put forward by the thirteen revolting American Colonies in 1772, but was declared unsound by all English constitutional authorities. These older precedents, however, according to South African constitutionalists, do not apply to the status of the Dominions since 1919; for the Treaty of Versailles, they claim, *by necessary implication,* although not in express terms, recognised the separate sovereignty of each Dominion, and this Treaty was ratified by an Imperial Act of Parliament. Of course, General Hertzog is not the author of this novel doctrine of Constitutional Law. It was formulated by General Smuts so long ago as 1920, and has ever since been known as "General Smuts' Theory of the Constitution". As General Smuts is a very able and scholarly lawyer—in the opinion of Lord Shaw, as expressed in "Letters to Isabel," one of the greatest legists of the age—the doctrine cannot be dismissed as fantastic or obviously wrong; but most English constitutional lawyers will hesitate to accept the revolutionary view that a subordinate colony can be granted the independent status of a Sovereign State merely by "necessary implication" from the provisions of a statutory treaty.

—*The Law Journal,* May 29, 1926, page 466.

Jefferson and Hamilton: Two Lawyer-Statesmen.—Every lawyer who is interested in the literary aspects of Legal History should glance at an extremely interesting article, styled "Jefferson and Hamilton," which appeared in the *Times Literary Supplement* of April 22. The article is nominally a review-leader on two recently published works: (1) "Life and Letters of Thomas Jefferson," by Mr. Francis Hirst; and (2) "Jefferson and Hamilton: the Struggle for Democracy in America," by Claude G. Bonds. But it is in substance a study of the part played by those two great lawyers in fixing the lines on which the American Constitution was to develop. Jefferson was a Southerner, a Virginian planter and lawyer: Hamilton was a West Indian from the small island of Nevis, who settled in New York and achieved a great forensic success in a short life, which included also a military and a political career of the first magnitude. He fell in a duel at the hand of a third lawyer, his rival, Aaron Burr, before he was thirty, but in the meantime he had drafted the Constitution of America and had succeeded in persuading thirteen independent States to unite in one semi-centralised federal government. Jefferson drafted the "Declaration of Independence"

while Hamilton was still a schoolboy, and lived to be President a quarter of century after Hamilton's death. But each played an equal part in deciding the lines along which the Constitution was built. Hamilton was an artistocrat in his political leanings, distrustful of liberty, of local government, and of the people: he would have preferred America to become a Monarchy with George Washington as the first hereditary monarch, and he succeeded in filling the Constitution with ingenious devices for preventing too rapid changes of law and for protecting the rights of property. Jefferson was a passionate democrat, and very nearly a philosophical anarchist in temperament, as well as in opinion. He distrusted the superior classes and central governments. But it was not until long after Hamilton's death that he succeeded in persuading the States, one by one (the matter being *ultra vires* the Federal Government), to abandon their restricted suffrages for a democratic franchise. The U. S. Constitution is the Grand Compromise between the ideas of those two great protagonists in the revolutionary "*Welt-Politik,*" to quote a convenient German phrase.

—*The Law Journal,* May 29, 1926, page 467.

The Lawyer-Successors of Jefferson.—It is interesting to note that nearly all Jefferson's leading ideas have been put into at least partial practice in the century since his day by American Presidents who were themselves lawyers. Jefferson's first and strongest article of faith, that all government must be based on the consent of the governed, which he derived from Algernon Sydney and introduced into the preamble of the "Declaration of Independence," led him also to advocate the election of all public officers, even Judges. This doctrine was realised, at least to a large extent, in 1826, when Andrew Jackson, of Tennessee, better known—like General Smuts, who is also a barrister—as "General" Jackson because of his services in the war against England in Canada, became President and put into operation the creed known as "Jacksonian Democracy," which later degenerated into "the spoils to the victors." Jackson also inherited Jefferson's feud with the Supreme Court, and every one remembers his famous *mot* about an anti-democratic decision of Chief Justice Marshall: "John Marshall has declared the law; now let John Marshall enforce it." Jefferson's hatred of slavery, and his desire to see it abolished. was fulfilled by the lawyer Abraham Lincoln in 1862. Jefferson's view that no territory should be annexed by America which could not in due course receive

American democratic institutions was the basis of the Lawyer-President, Grover Cleveland's, extension of semi-representative Government to Hawaii, and his advocacy of such a constitution for the Philippines, although these annexations occurred in a later Presidency. And, of course, Jefferson's ideals as to International Unity and Harmony found expression in the Covenant which we owe to a lawyer-President, Woodrow Wilson.

—*The Law Journal,* May 29, 1926, page 467.

The Plea of "Irresistible Impulse".—In *Rex* v. *Flavell* (*Times,* 13th inst.) Sir Edward Marshall Hall made a powerful appeal to the Court of Criminal Appeal to throw overboard the antiquated dogmas as to "Criminal Responsibility" laid down in *MacNaghten's case,* 1843, and to apply enlightened rules as laid down by modern medical men who are experts in psychopathology. In particular he urged the abandonment of the hopelessly unreal principle of "intellectual insanity," which is based on a psychology that has been out of date for much more than half a century, and urged that juries should be allowed to receive expert testimony as to the existence of "volitional incompetency," or as it is sometimes called "motor inhibition," popularly known by the misleading name of "Irresistible Impulse". This, however, the Court did not see its way to do; and, of course, the necessary alteration of the law is essentially a matter for legislation. Only three years ago, indeed, a Committee appointed by Lord Birkenhead, then Lord Chancellor, of which Sir Edward Marshall Hall was for some period a member, reported in favour of some far from drastic amendments of the law in this respect. These were embodied in a Bill which Lord Darling, at the request of the members of the Committee, introduced into the House of Lords, although not himself one of the reformers on this question. But that House refused to entertain the Bill. This obscurantist attitude of the Lords and of the majority of the King's Bench Judges is deeply to be regretted. "Insanity" is essentially a matter for medical expert opinion, and juries should find their verdict as to the criminal responsibility of a prisoner after hearing the medical evidence of experts and unfettered by artificial rules as to the nature of insanity invented one hundred years ago, when medical science was in its infancy, and psychological medicine was yet unborn.

—*The Law Journal,* June 17, 1926, p. 42.

BOOK REVIEWS.

THE INDIAN PENAL CODE, by Dinesh Chandra Roy, M.A., B. L., Vakil, Calcutta High Court. Published by Messrs. M. C. Sarkar and Sons. Price Rs. 10.

This is one of the valuable commentaries of the various important enactments brought out by Messrs. M. C. Sarkar & Sons. The work combines in itself all the advantages of a commentary on the Indian Penal Code useful to the student and the practitioner alike. It is not a digest type of publication giving merely references to the decided cases under the various provisions. Extracts are given from the leading judgments setting forth the principles involved in the various questions dealt with. Much of the bulk of the work is due to the fact that the author has included in his commentary copious extracts from the judgments of the highest Courts here and in England. The author has given under each section an illustration of the form of the charge under it which in many cases is a repetition of the terms of the section itself. This is sure to be found useful by the beginner in the profession, at any rate. The nature of the procedure is also given under each section as to whether an offence is cognizable, bailable, compoundable and triable by which class of Magistrates. With such practical points, the work is bound to be of great value to the practitioner. The discussion of the scope and the interpretation of the terms of the section is likely to be of particular value to the student. We have thus no doubt that the work will be greatly appreciated by all those having to do with the Criminal Law of India, especially as the author has given as appendices the various minor enactments on Criminal Law.

ELEMENTS OF THE INSOLVENCY LAW IN BRITISH INDIA, by N.B. Abuvala, B. A., LL. B., Solicitor, High Court, Bombay. Price Rs. 2-8-0.

This is a small book intended mainly for the students making their first acquaintance with the Insolvency Law in British India. The subject has not been dealt with by way of commentaries to the sections of the Provincial and the Presidency Towns Insolvency Acts but under the headings of chapters dealing with the various aspects of the law, under appropriate headings and references are given to the sections of both the Acts throughout and the differences are pointed out. The rules made by the Bombay High Court under the two Acts have been set out in the appendices; and test questions and answers are also given. We think the author has done everything necessary to make the book useful to students desirous of familiarising themselves with the subject.

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NEGOTIABLE INSTRUMENTS AND ALTERNATIVE CLAIMS ON THE ORIGINAL CAUSE OF ACTION.

It sometimes happens that a claim based on a negotiable instrument wholly fails, owing to the inadmissibility in evidence of the instrument under Stamp Law. In such cases the party who runs the risk of losing his suit struggles to get a decree by founding his claim on the original loan transaction. It also happens that a party brings an action on a negotiable instrument executed by some one in his individual capacity but the loan was perhaps really advanced not to him individually but either to a firm of which the executant is a partner or to a joint family of which the executant is the manager or other accredited representative. The representative capacity or the firm name does not appear on the face of the instrument, but the suitor concerned desires to get a decree either against all the members of the firm or the entire joint family as the case may be, though the non-executants are not *eo-nomine* liable under the instrument. In such cases also it is usual for a plaintiff to seek his remedy on the original loan transaction.

The validity of a claim based on the original loan transaction in cases like those mentioned above has often come up for consideration before the various High Courts in India. Bombay, Allahabad and Calcutta incline consistently to the view, that there being a substantial claim, the relief based upon the original debt as an independent cause of action ought to be allowed, at any rate, in cases where the negotiable instrument is inadmissible under the Stamp Law. In Madras the preponderance of authority is in favour of the view that where a loan transaction and a document which evidences it are simultaneous, there is only one cause of action for a plaintiff, namely, that based on the instrument. The argument on which this conclusion is sustained is that the

instrument is the only evidence of the transaction and that S. 91 of the Evidence Act is a bar to the giving of any evidence relating to the loan. The leading case in Madras on this point is *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) which has been followed in *Ammalu Ammal* v. *Namagiri Ammal* (2) and *Somaraju* v. *Venkatasubbarayudu* (3). Notwithstanding doubts cast on the correctness of that ruling in *Shanmuganatha Chetti* v. *Srinivasa Aiyar* (4) and *Nataraja Naicker* v. *Ayyasami Pillai* (5), the principle laid down in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) was reaffirmed by Sadasiva Aiyar, J., in *Thankammal* v. *Kunhamma*(6). If, however, a loan transaction preceded the instrument which evidences it,both in point of fact and in point of time, then according to the Madras view when the action on the instrument fails, as for example, owing to the inadmissibility of the instrument in evidence, the claim could be sustained on the original debt and even the plaint could be treated as amended so as to give the required relief to the party. Such was the case in *Nagamma* v. *Venkata Reddi* (7). The Lahore High Court also inclines to the view held by the Madras High Court.

Supposing a suit is brought on a negotiable instrument executed by some one in his individual capacity and it is found as a matter of fact that he borrowed the money either for the purposes of a joint family of which he was the head and manager or on behalf of a firm of which he was a partner and supposing the plaintiff claimed relief either against the entire joint family or against the firm what is the decree to be passed in such a case ? Judicial opinion on this question does not appear to be uniform. The highest Court of Appeal has stated apparently contradictory conclusions, though on a careful study, it may be possible to reconcile its different judgments. It may be mentioned here that there is another class of cases where liability on the instrument is enforced against all members of a joint family on the Hindu Law doctrine of representation [vide *Krishna Aiyar* v. *Krishnaswami Aiyar*(8) and *Thankammal* v. *Kunhamma*(6)].

The broad principle that has been enunciated with regard to negotiable instruments is that no one shall be made liable on

1. (1913) I L R 38 M 660: 26 M L J 19.
2. (1917) 33 M L J 631 at 644.
3. A I R 1925 Mad 351.
4. (1916) I L R 40 M 727: 31 M L J 158.
5. (1916) 32 M L J 354.
6. (1918) 37 M L J 369.
7. (1920) 12 L W 147.
8. (1900) I L R 23 M 597 (F B).

them unless they appear *eo-nomine* on the face of the instruments. No one shall enforce a right under a negotiable instrument unless he is on the face of it entitled to do it. So only a benamidar payee could sue for the recovery of money due on a negotiable instrument. [See *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (9)]. On the strength of this principle Ayling and Krishnaswami Aiyar, JJ. refused relief to a plaintiff who in a suit on a pronote executed by one of the partners in his individual capacity sought to make the other partner liable. *Kutti Ammu* v. *Purushotham Doss* (10). In a very nearly similar case reported in *Shanmuganatha Chetti* v. *Srinivasa Aiyar* (4) another Division Bench gave judgment against the entire firm on the principle that when money is borrowed for partnership purposes the firm is liable. It is pointed out in that case that the position of the creditor cannot be made worse by the execution of the instrument by one of the partners alone in his individual capacity. The anomaly that is pointed out is that if there is no instrument the creditor can get a decree against the firm, but if there is an instrument his remedy is restricted to the executant. The highly technical character of the Negotiable Instruments Act is not kept in view in this judgment. The positions taken in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (4) and *Nataraja Naicker* v. *Ayyasami Pillai* (5) do not go farther than this and similar conclusions have been reached in them on more or less the same line of reasoning. These cases have been decided on the authority of the Privy Council decision in *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11), and in one or two of them, the correctness of the ruling in *Kutti Ammu* v. *Purushotham Doss* (10) which apparently states a different conclusion has been questioned. The other Privy Council case to which attention must be drawn is *Sadasuk Janki Das* v. *Kishan Pershad* (12), where their Lordships lay down in plain terms that nobody can be made liable on a negotiable instrument unless his liability could be made out from the instrument itself. Their Lordships even combat the view that the names of the persons sought to be made liable need in *some way alone* be disclosed.

4. (1916) I L R 40 M 727: 31 M L J 138.
5. (1916) 32 M L J 354.
9. (1906) I L R 30 M 88: 16 M L J 508 (F B).
10. (1910) 9 M L T 120.
11. (1914) I L R 39 B 261: 28 M L J 515 (P C).
12. (1918) I L R 46 C 663: 36 M L J 429 (P C).

In *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) the suit was by an accommodation acceptor against the drawer by name and his partner to recoup himself for losses sustained by him on behalf of the firm of the drawer. The firm in question carried on business in sugar, shipping it from Mauritius to Hongkong at which latter place a market was to be found for the sugar. The two partners were originally carrying on a rival trade in sugar and with a view to stop the rivalry, they entered into an agreement of partnership which was to be in force for a year and subject to certain conditions. The partners drew bills individually for half the amounts on the plaintiff who as an accommodation acceptor became liable to pay the amounts due on the bills to the Mauritius banks in whose favour they were drawn. The business at Hongkong was looked after by the plaintiff and he had paid himself a portion of the money due to him by the sale of sugar. The business however failed and heavy losses ensued. One of the partners retired the bills he had drawn from the banks by payment. The other partner became insolvent and the banks enforced payments from the plaintiff, who in turn sued the firm for damages he had sustained on their behalf. If plaintiff was not an accommodation acceptor but was a real acceptor who became liable to discharge the bills on account of the dealings between him and the firm, he could not have made this claim against the firm. The firm in such a case would have successfully resisted the plaintiff's claim by saying that he had only paid off a debt due by him and that he could recover nothing against the firm. As plaintiff in this case was only an accommodation acceptor, he was a surety and the firm continued to be primarily liable. So when he discharged the bills he obtained the right to claim re-imbursement against the firm. The Privy Council rightly held this action not to be one brought purely on the bills, but a matter of accounting between the plaintiff and the defendants. They discussed the general law of liability of partners based upon the right of each partner to bind by his acts the firm and concluded that the plaintiff was entitled to indemnify himself against the firm. It is extremely doubtful whether the decree could have been obtained against both the partners if the suit had been brought by the banks in whose favour the bills had been drawn. If the banks had sued on the bills they could certainly have enforced payment from the plaintiff who was the accommodation acceptor and also from the partner who

11. (1914) I L R 39 B 261 ; 28 M L J 615 (P C).

had drawn the bills in his individual capacity. But could they have got a decree against the other partner who had not joined in drawing the bills in question? I venture to suggest that if *Sadasuk Janki Das* v. *Kishan Pershad* (12) lays down sound law, the banks could not have got a decree against the partner who had not joined in drawing the bills. In this view of the case it is submitted that those Madras cases which have been decided on the authority of *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) have gone on a misreading of the purport of that Privy Council judgment; *Sadasuk Janki Das* v. *Kishan Pershad* (12) really restores the principle laid down in *Kutti Ammu* v. *Purushotham Doss* (10). *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji* (11) does not really state a contrary conclusion and should have been decided like *Sadasuk Janki Das* v. *Kishan Pershad* (12) if the Mauritius banks had been the plaintiffs. *Sadasuk Janki Das* v. *Kishan Pershad* (12) has been followed in a host of cases; it is sufficient to refer to only two such cases, *Nagoor Meera* v. *Hajee Moidin Nainar Meera Ali* (13) and *Hari Mohan Ghose* v. *Sourendra Nath Mitter* (14). The Rangoon case related to a firm and the Calcutta case to a joint family. In both cases the non-executants were exempted from liability. Even the Hindu Law doctrine of representation has been given the go-by and the Privy Council case is given the fullest application.

A very interesting case was the one considered in *Ram Chandra Sahu* v. *Kasem Khan* (15). That also related to a claim on a pronote executed by a partner in his individual capacity. A decree was prayed for against the firm on the footing that the loan was made to the firm and it had had the use of the money. The right to base the claim on the original cause of action was apparently assumed in this case; but the relief was nevertheless refused on the ground that in order to make the firm liable it must be proved that the money was lent under a contract made by the borrower to make use of it for partnership purposes. The subsequent use of the money for partnership purposes by the borrower on his own initiative was held insufficient to make the firm liable.

P. V. AGHORAM AIYAR, B.A., B.L.,

PALGHAT. *Vakil.*

10. (1910) 9 M L T 120. 11. (1914) I L R 39 B 261 : 28 M L J 515 (P C)
12. (1918) I L R 46 C 663 : 36 M L J 429 (P C). 13. A I R 1925 R 264.
14. A I R 1925 C 1155. 15. (1923) 28 C W N 824.

THE LATE RAO BAHADUR T. SUBRAMANIA AIYAR

Sir P. S. Sivaswami Aiyar writes :—

" In the death of Rao Bahadur T. Subramania Aiyar of Salem there passed away one of the most conspicuous figures of the mofussil bar of the generation that is fast disappearing. He had a distinguished academical career at the Presidency College and was the contemporary of a set of brilliant young men which included Mr. (now Sir) P. Rajagopalachariar. Gifted with versatile parts, Mr. Subramania Aiyar was a favourite with all his professors and especially Mr. Thompson, the Principal of the College and Dr. Duncan, the Professor of Philosophy. Like several other lawyers who have risen to eminence, he joined the teaching profession before he took to the study of law. As a school master at Kumbakonam, he attracted the notice and won the regard of veteran educationists like Mr. T. Gopal Rao and Mr. Sadhu Seshayya. If the prospects of the teaching profession are a subject of grumbling even now, they were far more limited then and failed to satisfy the ambition of young men of talents. This period of his life was not without its compensation, for it enabled Mr. Subramania Aiyar to improve his gift of lucid exposition. After a period of three years' work in the pecuniarily unattractive field of education, he took to the study of law with all the zest born of a natural aptitude for the subject. On taking his law degree in 1885, he settled down to practise in his native district of Salem without going through an apprenticeship course in Madras. The fact that he was not enrolled as a Vakil of the High Court till five years later did not in any way affect his practice or popularity in the mofussil. The leaders of the Salem bar at the time were Mr. C. Vijayaraghavachariar (fortunately still living) on the criminal side and Mr. V. Krishnaswami Aiyar on the civil side. Mr. Subramania Aiyar had no difficulty in making his way in the profession and soon came to be recognised as a first class all-round advocate and lawyer. His merits were quickly recognised and he succeeded in winning the confidence of his clients and the esteem of all the Judges before whom he appeared. He soon became the leader of the bar and enjoyed a large and lucrative practice. He held the office of Government Pleader and Public Prosecutor for a period of six years towards the end of the nineties.

After making his fortune in Salem, he decided to transfer himself to Madras and practised in the High Court for a

period of ten years. Ill-health compelled him to go back to Salem in 1912 and during the last fourteen years his health was very fickle and began to decline steadily from 1920. In spite of his broken health he largely devoted his latter years in Salem to public work. As a President of the Taluk Board of Salem and as Chairman of the Municipal Council of Salem, he rendered excellent service in these two bodies. As a President of the First Class Bench Court, his services were equally valuable. Even after his health had completely broken down, he worked in the Flood Relief Committee at Salem in 1924 and did not spare himself in organising and carrying out measures for the alleviation of the distress caused by the disastrous floods of that year. He was a man of simple habits and preferred to lead a quiet and unostentatious life and was averse to advertisement of any kind. All deserving public causes appealed to him and he helped them liberally. Appeals to him on behalf of any public institution in need of pecuniary support met with a generous response, no matter whether it was secular or religious, whether it was a reading room or a hospital, or a temple or the relief of the poor.

In social and political matters he was an advocate of cautious reform. He was not a member of the noisy school of extremist politicians and he believed in constructive and useful public work rather than showy agitation.

It would perhaps be more appropriate to this Journal to dwell upon Mr. Subramania Aiyar's characteristics as a lawyer than as a private citizen. Though the greater part of his professional life was spent in a mofussil district, he was one of the few lawyers who have succeeded in keeping up and improving their knowledge of law. He had an excellent knowledge of case-law and was thoroughly grounded in the principles. Apart from his abilities as a lawyer, his outstanding merits were his conscientious thoroughness in the preparation of his cases and his great circumspection. There was no aspect of a case which he failed to study. No relevant detail was beneath his consideration. Every point in a case which could be taken for or against his client was carefully studied by him. He gave every attention to what may be called the strategy of a case and there was no development or eventuality which could take him by surprise. Clear-headed and far-seeing advocates of this type have unfortunately been rare and they are getting still rare to-day. Mr. Subramania Aiyar was one of the ten or twelve advocates of this kind whom I have known within the last forty years.

The disappearance of this type of advocates from the profession must be a matter of the deepest regret.

It might have been expected that with all his gifts and qualifications and experience, Mr. T. Subramania Aiyar would have achieved greater success at the High Court bar than he actually did. Respectable as his practice was, his success in Madras was not equal to his deserts or to his reputation in the mofussil. The transfer of one's practice from one place to another in the middle of a professional man's career is always a risky experiment. Changes of *milieu* and difficulties of adaptation present unforeseen obstacles. The cases in which this experiment has been a success may be counted on one's fingers. This is not the place to dwell on the personal side of the loss caused by Mr. T. Subramania Aiyar's death, but we may mourn the loss of an advocate of outstanding ability, of a lawyer of learning and subtlety and one whose professional conduct was characterised by a high sense of duty to his clients and to the Court, and of an unassuming citizen who was generous to good causes and institutions."

SUMMARY OF ENGLISH CASES.

LAKE *v.* SIMMONS, (1926) 2 K. B. 51: 95 L. J. K. B. 586.

Insurance policy—Construction—Theft by customer—Larceny by trick—Jewel entrusted to customer for approval—Liability of underwriter.

An insurance policy issued to a jeweller contained a clause exempting the insurers from liability for "loss by theft or dishonesty committed by any customer in respect of goods entrusted to him by the assured". A lady customer took two pearl necklaces with intent to steal them, on a false pretension that she was taking them to her husband for approval, and disposed of the same. She was convicted of larceny and thereafter the assured sued the Insurance Company on the policy. *Held,* by a majority of the Court of Appeal (Atkin, L. J. dissenting) reversing the decision of Macardie, J. in (1926) 1 K. B. 366 the underwriters were not liable, as they were protected by the exemption clause. The goods having been entrusted to a customer, in the ordinary sense of the term,

the fact that confidence had been misplaced did not prevent it from being an entrustment.

Per Atkin, L. J. :—The word "entrusted" implies the real consent of the owner who parts with possession and as the customer was guilty of larceny, there could not be in law any entrustment and hence the exemption clause did not protect the insurers from liability.

AKTIESELSKABET REIDAR *v.* ARCOS, LIMITED, (1926) 2 K. B. 83.

Shipping—Charterparty—Full and complete cargo—Meaning of—Failure to load full cargo—Demurrage—Claim for damages—If maintainable.

Under the terms of a charterparty, a ship was to load a full and complete cargo, provision being made for the rate of loading and payment of demurrage in case of delay. The charterers committed default in the matter of loading and hence the ship could carry only a full and complete winter cargo, which was much less than a full and complete summer cargo. The shipowners claimed 'dead freight', *i. e.*, damages based on the difference between the full and complete cargo the charterers had contracted to supply and what they did in fact supply. *Held*, they were entitled to the same. The provision in the charterparty as regards demurrage was only for the detention of the ship and that did not prevent the shipowner from suing for damages for breach of the primary obligation to provide a full and complete cargo.

NICHOLSON *v.* ENGLAND, (1926) 2 K. B. 93 : 95 L. J. K. B. 505.

Landlord and tenant—Lease—Extinguishment of—Operation of law—Subsequent payment of rent—Effect of—Revival of tenancy.

Where a tenancy is extinguished under the law of limitation in force, a subsequent payment of rent will not revive it, whether the tenancy be one at will or from year to year.

LIVERPOOL CORN TRADE ASSOCIATION *v.* MONKS, (1926) 2 K. B. 110 : 95 L. J. K. B. 519.

Income-tax—Association—Dealings among members—If a trade or business—Profits—If assessable to income-tax.

A trade association provided a market for corn trade, newsrooms, exchange and other facilities for its members, who were all required to be shareholders. Entrance fees had to be paid, annual subscriptions and charges for services rendered.

The question arose whether the association carried on a trade, adventure or concern within the meaning of Sch. D, Case I of the Income-tax Act, 1918. *Held,* it did, and the profits were assessable to income-tax. 14 A. C. 381 distinguished.

BUCKLE *v.* HOLMES, (1926) 2 K. B. 125 : 95 L. J. K. B. 547.

Tort—Trespass—Domestic cat attacking pigeons—Liability for damage caused.

The owner of a cat is not liable to damages when it trespasses on the land of a neighbour and does damage by attacking and killing pigeons, which is merely following a natural propensity of its kind.

Classification of animals with respect to liability for tortious acts discussed by Bankes, L. J., and the decision of the Divisional Court in 95 L. J. K. B. 158 affirmed.

SCOTT *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY, (1926) 2 K. B. 204 : 95 L. J. K. B. 510.

Workmen's Compensation Act—Accident proving fatal—Dependents—Whom includes—Widow's illegitimate children by another man—If can claim compensation.

Where a workman was killed in an accident arising out of his employment, and among his dependants was his widow, her illegitimate children by another man could not in any sense be held to be members of his family or dependent on him for the purposes of the Workmen's Compensation Act and the employers were not liable to pay compensation to them also.

In re LANG PROPELLER, LIMITED, (1926) 1 Ch. 585 : 95 L. J. Ch. 287.

Company—Mortgage—Winding up—Interest paid to mortgagee, less tax thereon—Right of the Crown to tax—If a preferential right—Companies Consolidation Act (1908), *S.* 209.

A company effected a mortgage of its properties and subsequently there was a voluntary winding up. Prior to the liquidation proceedings, the company paid to the mortgagee sums by way of interest *minus* the income-tax thereon, but the deduction by way of income-tax was never paid to the Inland Revenue Commissioners. The Crown claimed priority to all other creditors in respect of the income-tax thus payable. *Held,* the deduction was not a tax "assessed" on the company within the meaning of S. 209 of the Companies (Consolidation) Act, 1908, and hence there was no priority in respect of such a debt.

RELY-A-BELL BURGLAR AND FIRE ALARM COMPANY, LTD. *v*. EISLER, (1926) 1 Ch. 609..

Contract—Restraint of trade—Stipulations—Master and servant—Clause not to enter other employment during period of service or get interested in similar business—Breach of—Remedy—Injunction—Damages.

Under a contract of service entered into between the plaintiff and the defendant for a period of five years, the defendant agreed not to enter into any other employment or be interested in the business of any other company dealing in the same goods, *i. e.*, installing or dealing in burglary or fire alarms. During the third year of service, the defendant entered the service of a rival company and was allotted a share therein. The plaintiff claimed reliefs by way of injunction and damages. *Held,* (1) the covenant was quite valid as it related only to the period of service; (2) no injunction could be granted restraining the defendant from continuing in the service of the rival company, or restraining the rival company from employing him, the plaintiff's only remedy being one in damages ; but (3) an injunction restraining the defendant from being interested in the business of any rival company could be granted. Case-law discussed.

FENNELL *v*. EAST HAM CORPORATION, (1926) 1 Ch. 641.

*Statutory body—Education—Teachers—Married women—Dismissal of—Notice terminating services—Validity of—*Bona fides*—Motive—Relevancy of.*

The Educational Authority of a borough in pursuance of certain recommendations of a Committee resolved that the services of married women employed in their schools falling under certain classes should be dispensed with and with that object gave them the requisite notice under their respective contracts of service. The object was to provide work for unmarried women teachers who had been trained at the expense of the Educational Authority, and in the interests of educational efficiency. The policy that was adopted was not one of indiscriminate notices to all married women teachers, but to decide each case after considering the domestic circumstances of each, their duties at home and the earning capacity of their husbands. Three of such teachers who had been given notice sued for a declaration that the notices were invalid and not *bona fide* in the discharge of their duties. *Held,* following the decision of the Court of Appeal in (1926) 1 Ch. 66, the onus was on the plaintiffs to prove that the statutory body acted

in excess of its powers or for an object that was not lawful. The considerations adverted to by the Educational Authority were not irrelevant, and if they acted *bona fide*, their action cannot be challenged in a Court of Law.

GREENBERG *v.* COOPERSTEIN, (1926) 1 Ch. 657.

Company—Twenty members or more—Registration—If necessary—Acquisition of gain—Illegality without registration—Suit for administration of assets—Power of Court to order—Companies (Consolidation) Act, 1908, *S.* 1 (2).

An association consisting of more than twenty members was formed for the purpose of mutual help and raising loans. Weekly sums depending on the number of shares taken were paid into a fund and that was available for distribution among the members in the form of loans carrying interest. Quarrels having arisen among the members, some of them sued the Secretary and the Treasurer for administration of the assets. The latter pleaded that the Association not having been registered was illegal and no relief could be claimed. *Held,* (1) the Association was carrying on a business with the object of the acquisition of gain within the meaning of S. 1 (2) of the Companies (Consolidation) Act, 1908, and not having been registered under the Act, was illegal; but (2) the illegality did not prevent the subscribers from claiming from their agents in whose hands their moneys were the return of such moneys.

In re THAIN: THAIN *v.* THAIN, (1926) 1 Ch. 676: 95 L. J. Ch. 292.

Guardianship—Infant—Custody of—Father's rights—Welfare of infant—Child brought up from infancy by other relations—Effect of.

Under the well-settled practice of the Chancery Courts, the welfare of an infant is not the sole consideration in deciding the person who is to have custody of the infant. It is undoubtedly the paramount consideration, but among other considerations the wishes of an unimpeachable parent stand first. Even where an infant after the death of her mother soon after child-birth has been living for years with some relations who have been bringing her up with care and affection, a claim by the father for custody will prevail, unless the Court is judicially satisfied that the welfare of the child requires that the parental right should be superseded. The question as to who is to have custody is a matter within the discretion of the trial Judge to be exercised judicially and where the correct principles of

law have been applied, the Court of Appeal will not interfere with his discretion.

In re ANNESLEY : DAVIDSON *v.* ANNESLEY, (1926) 1 Ch. 692.

Domicil—Conflict of laws—Domicil of origin English—French domicil of choice—Law to be applied.

The domicil of a person flows from a combination of fact and intention, the fact of residence and the intention of remaining for an unlimited time. The intention required is not an intention specifically directed to a change of domicil, but an intention of residing in a country for an unlimited time. Domicil cannot depend upon mere declaration though the fact of the declaration having been made must be one of the elements to be weighed in arriving at a conclusion on the question of domicil. But if a particular domicil clearly emerges from a consideration of the other relevant facts, a declaration of intention to retain some other domicil will not suffice to destroy the result of these facts.

The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English Law as to domicil, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country.

ARCHER-SHEE *v.* BAKER, 95 L. J. K. B. 550.

Income-tax—Stocks and shares in the possession of foreign trustees—Income not remitted to Great Britain—Assessment—Income-tax Act, 1918, *Sch. D, Case V.*

A person residing in the United Kingdom, who is beneficially entitled to the income of a trust fund consisting of foreign stocks and shares in the hands of foreign trustees is assessable to income-tax thereon whether it is remitted to the United Kingdom or not under Sch. D, Case V of the Income-tax Act, 1918. The fact that the assessee is not the owner of the stocks and shares does not matter.

In re BOLD: BANKS *v.* HARTLAND, 95 L. J. Ch. 201.

Will—Construction—Residuary estate—Portion bequeathed to E*—Gift over in case* E *dies without issue to* J*—Death of* J *in the lifetime of* E*—Effect of—Gift to* E *if indefeasibly vested.*

A testatrix by her will devised a portion of her estate to *E* and if he died without leaving issue, that portion was to

be held in trust for *J* if he should attain the age of 21 years or marry under that age. After the death of the testatrix, but during the lifetime of *E, J* died before he attained the age of 21 or was married. The question arose whether *E* thereupon became indefeasibly entitled to the portion bequeathed. *Held*, *E* was not indefeasibly entitled to that portion, and in the event of his dying without leaving issue at his death, the portion would remain undisposed of and pass to the statutory next-of-kin of the testatrix.

In re HEWITT : HEWITT *v.* HEWITT, 95 L. J. Ch. 300.

Will—Construction—Trust to pay income to niece for life " until she takes the veil "—If refers to date of will or of death—Words of futurity.

In 1913 the testator who knew of his niece's intention to take the veil and become a professed nun with its involving a vow to lead a life of poverty made a will directing his trustees to hold a portion of his estate for his niece during her life or until she took the veil. In 1913 the niece took the veil and the testator died some years later. *Held*, the words of futurity in the will as regards the niece referred to her taking the veil at any time after the date of the will and not after the death of the testator and the event upon which her interest was to cease having occurred in the lifetime of the testator, she was not a beneficiary under the will.

HERBERT *v.* HIGGINS, 95 L. J. Ch. 303.

Bankruptcy—Reputed ownership—Grantee under bill of sale taking possession prior to Receiving Order—Service of bankruptcy notice—Act of bankruptcy—Transaction if protected—Bankruptcy Act, 1914, *Ss.* 38 *and* 45.

Notice of the service of a bankruptcy notice, coupled with notice that a creditor intended to take bankruptcy proceedings does not constitute notice of an available act of bankruptcy, as it is not notice of a fact but only of an intention to take proceedings. Hence a creditor who took possession of goods under the terms of a bill of sale before a receiving order had been made against the debtor is protected by S. 45 of the Bankruptcy Act, 1914, though the goods were in the reputed possession of the debtor at the commencement of bankruptcy.

In re CLARK : CLARK *v.* CLARK, 95 L. J. Ch. 325.

Will—Construction—Income of estate to son so long as he can personally enjoy—Adjudication of son—Effect of—Forfeiture.

A testator by his will directed his trustees to hold the income of a portion of his estate for the benefit of his son during "his lifetime, as would not, although the same were payable to him, be by his act or default or by operation of law, so disposed of as to prevent his personal enjoyment thereof" and then followed some alternative provisions in the event of his ceasing to have personal enjoyment. The son became an insolvent. *Held,* there was a forfeiture, and so long as the bankruptcy lasted, the forfeiture would remain operative.

GOLD FIELDS AMERICAN DEVELOPMENT CO. *v.* CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA, LIMITED, 95 L. J. Ch. 329.

Income-tax—Payment of tax in the Dominions—Deduction—Passing on relief—Income-tax Act, 1918.

A company held a number of preferential shares in another company, who themselves held a number of shares in a third company. The third company having paid Dominion income-tax on its dividends, the second company was allowed a deduction with respect thereto when assessed to income-tax in the United Kingdom. *Held,* the relief obtained by them must be passed on to their shareholders, the first company, in their turn.

JAGGER *v.* JAGGER, (1926) P. 93: 95 L. J. P. D. & A. 83.

Divorce—Interim order for maintenance—Settlement of property on second marriage—Divorce Court if can set aside settlement—Parties to application.

A wife obtained a decree *nisi* against her husband and that was duly made absolute. She then applied for permanent maintenance and an interim order was passed providing for maintenance at a certain rate. Before any final order was passed, the husband married again and the moneys owing to him under certain subsisting contracts to work as a sculptor, he assigned to the trustees of a settlement made on his second marriage, leaving a certain sum to satisfy any final order for maintenance that might be passed against him. Subsequently, a final order for maintenance was passed directing him to pay maintenance at a certain rate and to give security for future maintenance. The wife claimed an order setting aside the settlement made on second marriage, as it was practically one made *pendente lite.* *Held* (by the Court of Appeal affirming the decision of Hill, J.), though the Divorce Court had power on an application being made to it to restrain a husband from

alienating his property and thus defeating claims for maintenance, it had no power to set aside a settlement made on a second marriage, even if it might result in defeating future claims for maintenance.

Per Scrutton, L. J. and *Sargant, L. J.* :—An order affecting such a settlement cannot be made in proceedings to which neither the trustees nor the beneficiaries under the settlement are parties.

W. *v.* W., (1926) P. 111 : 95 L. J. P. D. & A. 56.

Divorce—Custody of child—Wife applying for restitution of conjugal rights—Husband not complying with order of Court—Contempt—Effect of, on custody of child—Welfare of child, the main consideration.

A decree for restitution of conjugal rights was passed in favour of a wife, but the husband did not comply with the order. The wife then applied for custody of their child. *Held,* the mere fact that the husband was in contempt for disobedience of the Court's decree for restitution of conjugal rights did not entitle the wife to the custody. In such a case, the Court has to consider what would be for the welfare of the minor and pass such order as it thinks would be most conducive for its welfare.

In re BOOTH : BOOTH *v.* BOOTH, (1926) P. 118 : 95 L. J. P. D. & A. 64.

Will—Soldier's will—When can be made—Embarkation for service—Accidental burning of will—If amounts to revocation—Duration of will—Period of one year after discharge if applies to English Law as in Roman Law.

A will made by an English soldier just prior to embarkation in pursuance of orders to proceed abroad to take part in a campaign is for all purposes a will made in actual military service. Such a will does not, as under the Roman Law, become null and void a year after the soldier's discharge. Where years after, such a will was destroyed by fire by accident, and the testator kept quiet, there is no revocation of the will and it can be proved by oral evidence.

IN THE ESTATE OF WHITE TODD, (1926) P. 173.

Will—General English will and special will relating to assets in America—Executors different—Interdependant of wills—Proof of wills.

A testator left two wills, one dealing with his English property and another with his American property. The

executors of the two wills were different and there was a specific provision that the latter should be probated in America. *Held,* there was no obligation on the party propounding the first will to obtain probate of the second. In every case the question is if the papers are independent or interdependent.

KHOO HOOI LEONG *v.* KHOO HEAN QUEE, 95 L. J. P. C. 94.

Will—Construction—Settlement of property among sons and their descendants—Grandson through illegitimate son—Subsequent will—Mention of son as legitimate—Rule of construing settlement.

A testator first made a settlement in which after giving himself a life-estate in his realty, he disposed of the property after his death among his sons and their descendants. *X* was a grandson of the testator, but his father was considered to be an illegitimate son and was not mentioned in the settlement. Some months later, the testator made a will disposing of his personalty and therein he referred to the father of *X* as a legitimate son and made a bequest in his favour. The question was whether for the purposes of the settlement also, *X's* father could be treated as one of the sons of the testator. *Held,* there being no ambiguity in the deed of settlement, the subsequent will could not be used as a "dictionary" for construing it. Where there is a gift to a class, such as 'sons,' there is a *prima facie* interpretation of words denoting descent or relationship which holds the field till it is displaced. Children as such means legitimate children and any evidence *de hors* the instrument itself to show that the settlor must have meant to use ordinary words otherwise than in their usual meaning cannot be admitted.

PALMER *v.* CAREY, 95 L. J. P. C. 146.

Bankruptcy—Agreement to advance money—Purchase of goods—Proceeds of sale to be paid to lender's account—Equitable assignment.

A person who was carrying on business in the sale of goods wanted money for that purpose and he entered into an agreement with another that the latter was to advance moneys for the purchase of goods and as and when the goods were sold the realisations were to be paid to the creditor's account in his bank. The debtor became an insolvent. *Held,* the agreement did not create any right of property in either the goods or the proceeds of sale of the goods amounting to an equitable assignment such as would be binding on the trustee in bankruptcy.

JOTTINGS AND CUTTINGS.

The Motor Peril.—To anyone who values human life and safety and the amenities of existence, which are now gravely imperilled by the default of the responsible authorities in enforcing the criminal law against motorists—and especially against motor cyclists—the debate in the House of Lords on June 30 on Earl Russell's Motor Vehicles Compulsory Insurance Bill is quite the most interesting of recent Parliamentary incidents. The Bill was withdrawn, and it does not matter much now what it contained, but the idea was that every motorist should be compulsorily insured against third party risks to such an extent that an injured person should be guaranteed any damages recovered up to £5,000. For our own part, we have left the criminal motorist alone recently. We have on various occasions expressed our own views with sufficient clearness, and, we hope, with sufficient force, and as the responsibility is not ours, we have watched the growing tale of deaths, and wondered how long the patience of the non-motorist and the law-abiding motorist would endure. Surely never since men professed to be civilised has the indifference to life been so great as it is to-day. Man's "very command over nature," says Mr. G. M. Trevelyan at the conclusion of his recently published History of England, "so admirably and marvellously won, has become his greatest peril."

—*The Law Journal*, July 17, 1926, page 42.

Compulsory Motor Insurance.—But to return to the House of Lords. We admire our own reticence when we read the terms in which the reckless motorist was spoken of. We have never said that fifty miles an hour is the minimum speed of a motor cyclist; indeed, we have admitted that there are law-abiding persons of this class, though they are not often seen. We have never suggested the alternatives of imprisonment with hard labour, or a rope to the nearest lamp-post. We have been satisfied with the former. But expressions like this show that we have been fully justified in the comments we have made on the laxity of the enforcement of the law. It is to that laxity that the deaths which can be read of daily in any paper are due; with a liberal increase for the week-end. But while there was general agreement as to the magnitude of the danger, the methods of Lord Russell's Bill came in for damaging criticism, and it received its quietus when Lord Sumner pointed out that, in the case of the offending motorist's

bankruptcy, the £5,000, or whatever it might be, paid by the insurance company would not go to the injured person, but would be claimed by the trustee in bankruptcy for the benefit of the general creditors. But insurance will be less necessary when all motor racing and pillion riding, and the use of high-speed cars is stopped, and the use of motor cycles is allowed only under strict regulations, their use in towns being prohibited altogether.

—*The Law Journal,* July 17, 1926, page 43.

Appeals "in vacuo".—It was a little startling to hear last week that an application to expedite an appeal, made to the Court of Appeal by two of the most eminent members of the Bar, had been characterised by that Court as discourteous to the Judge of first instance. *Prima facie* it certainly invited criticism. Mr. Justice Astbury had reserved judgment in an important Railway Rates case, and the application in question was thereupon made. Obviously against an undelivered judgment there can be no appeal, but apparently each side had determined, if unsuccessful, to make the Court of Appeal a stepping-stone to the highest tribunal, and they both concurred in the application. *Hinc illae lacrimae.* Happily, the immediate trouble was easily disposed of. The application had been in fact made with Mr. Justice Astbury's knowledge and approval, and so the Master of the Rolls was able to say next day that the question of discourtesy disappeared. He delivered, however, a neat little homily on the importance of each Court in the ascending scale assisting the Court above it with a carefully reasoned judgment. But we rather think the Court of Appeal itself has been known to deal with a case somewhat summarily when it is only *en route* to the House of Lords. The judgment of Astbury, J., prepared with his usual care, was delivered last Tuesday.

—*The Law Journal,* July 24, 1926, p. 63.

Mr. Justice McCardie and Uncaught Criminals.—In a recent charge to the Grand Jury on Assizes, Sir Henry McCardie called attention to the great increase in the number of crimes the perpetrators of which go undetected by the police. His Lordship suggested as a large contributory cause of this (we do not gather that he considered it the only cause) the great change which has come over the duties of the police force in the last fifty years, and more especially since the war. When Sir Robert Peel replaced the old obsolete system of

elected city watchmen and of professional detectives—known as "Bow Street Runners"—by the modern organised and disciplined police force, the duties of a constable were practically confined to the prevention of breaches of the peace and the arrest of felons engaged in serious crimes. Except when directed to execute the warrant of a Justice of the Peace or to serve on some defendant a summons issued at the instance of some private or official prosecutor, it was no part of his duty to assist in conserving the local government of the country. Nor was he expected to interfere with the ill-treatment of children or animals. He was proverbially warned to leave alone the quarrels of husbands or wives, and with several other offences he had nothing to do. Nuisances it was no part of his duty to abate or prevent. Drunks he had no power to arrest unless they committed an assault or were otherwise guilty of breaches of the peace. Motor-cars, and the multitudinous duties they impose on the protectors of the public safety, had not yet come into being out of Tartarus, or wherever else Vulcan may have instigated the designing of these contrivances which the unsophisticated native of Africa and India still calls "devil-machines." Now all this is changed. The legislature has set about controlling the lives of its citizens by enacting innumerable statutes, and the local authorities are equally busy with bye-laws. The relations between the sexes are the subject of rigid interference which grows ever more drastic. Motor-cars, public-houses, and those who resort of them, matrimonial disputes, children, animals, nuisances; all these are now within the view of the policeman. A knowledge of law is expected of him, and he has to attend courses of instruction therein, and even to pass examinations. It is inevitable that he has less time to watch for and shadow the professional criminals who commit burglary or larceny, or to follow like a sleuth-hound on the trail of the murderer.

—*The Law Journal*, July 24, 1926, page 65.

Recovery of Betting Debts.—The recent decision of the Court of Appeal (Bankes, Atkin, and Sargant, L. JJ.) in *Hyde* v. *Tyler* (*Times*, 25th ult.), would seem to indicate that the Courts of Common Law are now engaged in calling a halt to the tendency which commenced a generation ago of trying to find roundabout devices by which the winner of a bet can sue the loser, notwithstanding the statutory bar to the recovery of such debts. At Common Law, as is well known, the King's Bench held that wagers were not indeed irrecoverable

but could only be recovered in actions provided the Court had no other business. Then the Legislature began to interfere. The Gaming Act, 1845, rendered void and irrecoverable all gaming and wagering debts ; and under two earlier statutes, the Gaming Act, 1710, and the Gaming Act, 1825, cheques given in payment of such wagers were deemed to be given for an illegal consideration. There has been other statute law on the point, not relevant to our immediate purpose . But after the last important statute, the Gaming Act of 1892, a reaction in the Courts set in. Ways and means of getting out of the legislative prohibition were devised by ingenious counsel and found unexpected support and sympathy from the Bench. Thus it was held in *De Mattos* v. *Benjamin* (1894, 63 L. J., Q. B 30) that the Act of 1892 does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any money in his hands received on account of such bets.

—*The Law Journal*, July 24, 1926, page 65.

The Rule in Hyams v. *Stuart King*.—Again in *O'Sullivan* v. *Thomas* (1895, 64 L. J , Q. B. 398), it was held that a party to a bet could recover from a stake-holder money deposited with a shareholder by him before he had paid it over to the winner. Finally, in *Goodson* v. *Grierson* (1908, 1 K. B. 761), and in *Hyams* v. *Stuart King* (1908, 2 K. B. 696), the Court of Appeal (Moulton, L. J. , dissenting), found what practically amounted to a way out of the statutory prohibition altogether. It was there held that if a bookmaker or other winner of a bet threatens to sue the loser, or to have him posted at Tattersall's, or elsewhere, as a defaulter, and then forbears to sue in consideration of the loser promising to pay the debt, or giving a cheque in payment, such forbearance " to sue " is a " new consideration " supporting a new promise to pay, or the implied promise contained in a cheque, which is in no way tainted with the character of a betting transaction, and therefore can be sued upon in the Courts. Since 1908 there has been a harvest of litigation in which the limits of this principle have had to be constantly considered. In *Hyde* v. *Tyler*, where a party to a bet had agreed to abide by the decision of Tattersall's as to the odds, the plaintiff sued on this as on an implied promise to pay It is difficult to distinguish this case from *Hyams* v. *Stuart King* on any ground of substantial principle. But Mr. Justice Horridge held that

here there was no implied new promise to pay and the Court of Appeal have upheld his decision.

—*The Law Journal*, July 24, 1926, page 66.

The Evidence of Handwriting Experts.—Mr. Justice Swift, in a recent case, refused to pay any attention to the evidence of a handwriting expert on the ground that such evidence was worthless. This view is not at present supported by any authoritative decision, although, ever since the error of M. Guerin (afterwards handsomely acknowledged and retrieved) in the famous Adolf Beck case, many Judges have warned juries not to attach too much importance to it. A practical difficulty is found in ascertaining the qualifications which a witness must possess before he can be accepted as an "expert". There are only one or two persons who actually practise as experts. But Bank clerks, cashiers, shorthand writers, and others who have professional or commercial experience in the deciphering of scripts, are, in fact, generally permitted to be called as expert witnesses at the Old Bailey. Forgery and libel cases, of course, are those in which this crime most frequently arises, but in murder cases the identification of an accused person's handwriting is sometimes material. In the case, two years ago, of the Frenchman, Jacques Vacquier, who was accused of poisoning the landlord of a public-house, and who had purchased poison of a Bloomsbury chemist, the question seemed at one point likely to be material, but the accused in the event admitted the purchase. In the Maybrick case a similar issue was not immaterial. Even if experts were excluded from the Courts in charges involving comparison of handwritings, juries would have to exercise their own opinion by an investigation of the scripts alleged to be identical, and experience shows that they are, in fact, assisted by having their attention drawn to similarities or dissimilarities, which are only discoverable by experts, although, once detected, the jury can discern their presence.

—*The Law Journal*, July 24, 1926, page 66.

BOOK REVIEWS.

THE LAW OF TRANSFER IN BRITISH INDIA, by Sir H.S. Gour. Fifth Edition. Published by Messrs. Butterworth & Co. Price Rs. 45.

The publication of the 5th edition of Sir Hari Singh Gour's Law of Transfer in British India has come none too soon. Since the commentaries on the Transfer of Property Act by the late Sir Horatio Shepherd and Mr. Brown became out of date, Dr. Gour's work has held the foremost place among the commentaries of the Transfer of Property Act. The enactment itself not being a perfect piece of legislation on the subject as pointed out by Mr. Justice Mukherji of the Allahabad High Court in his work on the Law of Transfer, inasmuch as many portions of the enactment are not of much practical importance in this country and because also many questions of daily use have not at all been dealt with in the enactment, the author's discussions though not strictly directed to the terms of the Act are of great advantage in elucidating the subject as a whole. It has also to be regretfully noticed that on many points there are conflicting decisions in the various High Courts and in some cases between decisions in the same High Court. In this state of things in India even the decisions of the Privy Council have not tended to clear up matters and the pronouncements of the highest tribunal are not such as the High Courts can acquiesce in without demur. Here we would only refer to the latest decision of the Privy Council [*Dayal Singh* v. *Indar Singh* (1)] where it has been held that an agreement to sell immoveable property requires registration under S. 55 (6) (*b*) of the Transfer of Property Act if an advance of over a hundred rupees is paid and recited in it. Unfortunately this decision has appeared after the publication of the present work and we have not therefore the benefit of Sir Hari Singh Gour's criticism on it. It is impossible to see how a charge which is created merely by the operation of law or by an implied agreement can be registered. Again, it was only the other day that the legislature had to step in to rectify the situation created by *Shamu Pattar's case* (2) regarding the meaning of attestation as used in the Act, by enacting the Transfer of Property Amendment Act (XXVII of 1926). In this state of authorities Sir Hari Singh Gour's criticism of cases proceeding from his deep study and careful examination are bound to be of great value. Under the various sections of the Transfer of

1. (1926) 24 L W 396 (P C). 2. (1912) I L R 35 M 607: 23 M L J 321 (P C).

Property Act, the learned author has given not only the provisions of the English Conveyancing Act, but also of the recent consolidating enactment in England, the Law of Transfer of Property Act, 1922. It is needless to add that in the present edition the case-law has been brought up-to-date and the text has been revised in appropriate places to suit the growing mass of case-law.

DIGEST OF PRIVY COUNCIL RULINGS (1913 to 1925), with Supplement and Notes to Vols. I and II, by P. Hari Rao. Law Printing House, Madras. Price Rs. 10.

We have great pleasure in welcoming this publication which is intended as a companion volume to the late Mr. Sanjeeva Rao's Digest of Privy Council Rulings which brought the cases up to the end of 1912. The present volumes bring the rulings up-to-date. The plan adopted by the work is so well-known that we need not say much about it. The Digest gives not only the effect of the Privy Council decisions under the various heads but has also noticed how each one of the decisions has been dealt with later by the Privy Council itself and by the various High Courts. This treatment is very useful as it saves the task of going through an index of cases which sometimes turns out to be profitless. We have no doubt this work will enjoy the popularity of Mr. Sanjeeva Rao's work to which it is a necessary complement.

THE LAW RELATING TO PRIVATE COMPANIES IN INDIA, by Alexander Kinney. Second Edition, 1926. Published by Messrs. Thacker and Spink & Co., Calcutta. Price Rs. 8.

This book does not adopt the form of a commentary on the Indian Companies Act of which there are several in the field. This is an attempt to place before the Managing Agents, Secretaries, Directors and others interested in the conduct of affairs of a company or its management a natural and a logical treatment of the law relating to private companies in five chapters with an appendix. This treatment has its own use even to a lawyer making his acquaintance with the Company Law in getting a synthetic bird's eye view of the subject with its bearings. The work is not encrusted with the entire mass of case-law on it; but only the more important decisions have been noticed. We have no doubt that this treatment will be found useful by the beginners in the Law of Companies and by the lay persons having to deal with Companies.

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LAW REPORTS*

VIII. ENGLISH REPORTS.

The Reports since the accession of George III have a much more systematised and uniform character than those before that date. Of these, we have already dealt with Burrow's Reports. The next in order of time is Douglas' Reports (1778-1784). The last two volumes in this series were published by Frere and Roscoe, Mr. Douglas having abandoned his original design. Durnford and East (1785-1800) began the practice of reporting cases term by term and hence their reports came to be known as Term Reports. Till then, Reports used to be published long after the decisions were pronounced—as we saw in the case of Lord Hardwicke—long after the Judge had ceased to preside over the Court, in some earlier instances, even long after the lifetime of the Judge and the Reporter. The Reports also are fuller. The Reporters are no longer content with saying—it was decreed—it was declared and so forth ; they give the judgments more or less in the language of the Judges with reasons. Altogether, the Reports exhibit greater care, accuracy and finish, including propriety of style. They are equally distinguished by the terseness and the accuracy with which the points decided are brought out in the headnote. The references to the cases cited seem to have been verified with the greatest care.

These two series cover the period of Lord Kenyon's Chief Justiceship. We have already had occasion to refer to him when dealing with the life of Lord Mansfield. He was a great master of Common Law, though his Latin was, according to Lord Campbell, execrable; it seems he had a number of Latin maxims which he let off—mostly wrongly—so that Lord

*The eighth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

Lyndhurst is reported to have told him once to give up his bad Latin, and stick to his good English Law.

Lord Kenyon was succeeded by Lord Ellenborough who was Chief Justice from 1802 to 1817. His judgments sitting in *bank* are reported in East's Term Reports and in Maule and Selwyn. Among his Puisnes were Abbot, subsequently Chief Justice, Holroyd, Bayley (well versed in pleadings) and Leblanc, all eminent Judges. When the last Judge died, the reporter notes *"Illo nemo neque integrior erat in curtate neque sanctior"* (5 Maule and Selwyn, page 1). Lord Ellenborough's *nisi prius* judgments are reported by Campbell who claims credit for giving him reputation for correct decision by a judicious omission of all bad decisions. His dictum notwithstanding, Lord Ellenborough was a quick and accurate Judge. His manner was apparently rough. At any rate Lord Campbell says he was terribly afraid of him. He was against all reform of criminal law and opposed the measure introduced by Sir Samuel Romilly to substitute transportation for death sentence hitherto inflicted in the case of offences of stealing up to five shillings and the reason given by him was that if that one change was allowed, other changes might follow in its wake—which might be disastrous.

Next come Barnewall and Alderson's Reports which cover the period 1817-1822 when Alderson became Judge—Alderson, J., finally Baron Alderson. Then, a fresh series was started by Barnewall and Cresswell which continued till 1830 when Cresswell became Judge and his place was taken by Adolphus and we have the series Barnewall and Adolphus. This series continued till 1834. In 2 Barnewall & Alderson we get to Abbot, C. J., who was already puisne for some years. It is said of him by Lord Campbell, that though poor as an advocate, his powers expanded as he was elevated and he became one of the best Judges—an opinion shared in by Pollock, C. B., in *Pearce* v. *Brookes*, where he says " though not distinguished as an advocate nor at first eminent as a Judge (he) was one than whom few have adorned the Bench with clearer views or more accurate minds or have produced more beneficial results in the law." (L.R. 2 Ex. 213, 317, 318). In 6 Barnewall & Cresswell we get to Lord Tenterden who succeeded Abbot as Chief Justice of the King's Bench. He was the son of a barber and ended life as Chief Justice. Denman became Chief Justice in 1832 on the death of Lord Tenterden. His puisnes were

Littledale, Parke, Patteson and Taunton. The first had become Judge in 1824, and is characterised by Lord Campbell as the "most acute, learned and simple-minded of mankind" —a thorough lawyer but an infant in the ways of the world taking little interest in anything beyond the narrow range of his profession. He continued Judge till 1841. Parke, J. became Judge in 1828. In 3 Barn. & Adolphus you will find his name for the first time. He became a Baron of Exchequer in 1834 and continued in that capacity till 1856 when he was made a life-peer under the name of Lord Wensleydale. He was the first life-peer to be created. He was a Judge of great ability whose only fault, it is said, was over-subtlety, leading at times to the sacrifice of substance to forms of pleading. His judgments in the Exchequer Court are reported in the many volumes of Meeson and Welsby. Patteson was Judge from 1830 to 1852 and was well thought of as a Judge. Taunton was a reporter of the Common Pleas and became Judge in 1832. He was a learned lawyer but died early (1835). Till Lyndhurst, Parke and Alderson went to the Exchequer Court, it was a comparatively inefficient Court and work concentrated mainly in the King's Bench and so, Denman had constantly to be fighting as he said "the gigantic monster called Arrear". His manner to the bar was pleasant and formed a great contrast apparently to that of Lord Kenyon and Lord Ellenborough. Williams, J. died in 1846 and was succeeded by Erle who was already a Judge of the Common Pleas, and continued as a Judge of the Queen's Bench for 13 years when he became Chief Justice of the Common Pleas in which capacity he continued till 1866. He was one of the most eminent Judges that ever sat there, combining learning, diligence, patience and courage: Coleridge became Judge in 1835 and continued till 1858. His summing up to the jury, it is said, was always a pleasure to hear. He had a very good English style and was a classical scholar besides. Denman continued Chief Justice till 1850 when he resigned owing to ill-health and Lord Campbell took his place. The period of Lord Denman is covered by Barnewall and Adolphus (1830-1834), Adolphus and Ellis (1830-1834) and the first fourteen volumes of Queen's Bench new series.

Lord Campbell's judgments are to be found in Adolphus and Ellis (N.S.), Vols. 15 to 18 and Ellis and Blackburn, Vols. 1 to 9. The Reports of Ellis and Blackburn are distinguished for the care and success with which extraneous matter is stripped off and the essence of the case is

presented. Brevity is achieved without obscurity. We find some of his judgments even in Ellis, Blackburn and Ellis (1858) and Ellis and Ellis (1858-1860). When he was appointed in 1850, he says, he read up all the Reports from 1842 to 1849 to prevent any important reported decision being sprung upon him as a surprise. He went through a similar process as to Equity decisions when later on he became Lord Chancellor. As an advocate, he seems to have been somewhat unscrupulous, being in the habit of mis-stating a date or slurring over a fact when it suited his purpose to do so and the habit seems to have pursued him even in summing up to the jury whom he wanted to persuade by every means to take his view of the facts. As a Common Law Judge, he was everything that could be desired. His tenure of office as Lord Chancellor was much too short for him to achieve any great reputation nor were his equipments such as to bring him that reputation. He himself had no hope of being quoted as a great Equity authority, his ambition being not to tarnish his Common Law reputation.

Lord Campbell was succeeded by Cockburn in 1858. He was Chief Justice of the Common Pleas for some time, having been appointed to that office in 1856. Cockburn has a distinguished place in the roll of Chief Justices though he did not come up to the full level of expectations raised by his eminence as an advocate. Cockburn goes over the period we have set to ourselves for to-day, that is, 1866. He was the first Lord Chief Justice under the Judicature Act. He tried the famous *Tichborne case*. He was a conservative lawyer—he protested against Judges being appointed to try Election Petitions—his ground being that Judges will be contaminated by contact with politics. Neither could he reconcile himself to the Judicature Act. As Attorney-General he combated the opinion expressed by Brougham that an Advocate in the discharge of his duty knew only his client with the famous phrase " that the weapon of the Advocate was the sword of the soldier, not the dagger of the assassin". No Judge was more dignified than Cockburn on the Bench. His contributions to the law of the country are not very substantial. Such as they were, he has the credit of having shaped the law of libel in regard to the press in *Wason* v. *Walter*, *Campbell* v. *Spottiswoode* and *Seymour* v. *Butterworth*. In the Jamaica case, he laid down the limits of martial law and this was his greatest contribution to the cause of personal liberty. For clearness

of expression and closeness of reasoning, his judgment in the *Franconia case* in which he held with the majority, that the English Courts had no territorial jurisdiction outside the low water-mark on the sea is a good example of his style. His technical knowledge was somewhat defective but this defect was made up by Blackburn whom he had as a colleague almost from the very beginning. Blackburn was practically unknown at the time of his appointment but his judicial career showed what profound lawyer he was and in point of erudition there is hardly any Judge whose reputation stands higher than that of Blackburn. "It used to be said," says Lord Campbell, "that there were four ways in which men could get on in the profession, (*i*) by huggery, (*ii*) by writing a law-book, (*iii*) by appearing at the Quarter Sessions, and (*iv*) by a miracle." By huggery was meant making friends with the attorneys and by giving dinners to them—of course, not forgetting their clerks who would be given suppers. As an instance of people becoming famous by writing a law book and thus becoming Judges used to be given Alan Parke, J. who was the author of a book on Insurance. Perhaps Blackburn also was an instance in point as Lord Lindley was slightly later. Lord Campbell himself improved his fortunes considerably by marrying the daughter of Abinger.

For a part of the same period we have another series, Dowling & Ryland (1821-1827), Manning & Ryland (1827-1830), Neville & Manning (1831-1836), Neville & Perry (1836-1838), Perry & Davison (1841-1843) and Davison and Merivale (1843-1844). There are other series for shorter periods still. Harrison & Wollaston (1835-1836), Willmore, Wollaston and Davison (1837), Willmore, Wollaston & Hodges (1838-1839) and Arnold & Hodges (1840-1841). All these Reports were confined exclusively to cases before the King's Bench including decisions on Error before the Exchequer Chamber or the House of Lords arising therefrom. Before the time we are dealing with, it was quite in the ordinary course that the same Report dealt with all the Courts of Common Law. It is quite exceptional to find a Report dealing only with one Court. Even if it did largely deal with cases of one Court, say the King's Bench, there would be some cases at least, from the Common Pleas or the Exchequer Court. During this period you find reporters confining themselves exclusively to one Court. We find further specialisation such as Bail Court, Nisi Prius and Crown Cases. What is meant by a Bail Court or by Nisi Prius, we

have already explained. The Bail Court Reports begin with Chitty (1819-1820) though it does not confine itself exclusively to them. Some judgments of Lord Mansfield between 1780 and 1787 also are to be found in this Report. Dowling (1830-1840), Dowling N. S. (1841-1842), Dowling & Lowndes (1843-1849), Lowndes, Maxwell & Pollock (1850-1851), Bail Court Cases (Lowndes and Maxwell alone) (1851-1854) are other Reports that report Bail Court Cases. Saunders & Cole's Bail Court Reports deal with the period 1846 to 1848.

For Crown cases you start with Russel & Ryan (1799-1823). Levin's Crown Cases on the Northern Circuit (1822-1838) contain more amusing matter than any other law book. We have such amazing marginal notes as "possession in Scotland is evidence of stealing in England." Davison (sometimes cited as Davison & Pearce) deals with the period 1844-1852, Dearsley from 1852 to 1856, Dearsley & Bell from 1856 to 1858, Bell from 1858 to 1860 and Leigh & Cave from 1861 to 1865. Cox's Criminal Cases begin in 1843 and go over the period we are dealing with. Temple & Mew's Criminal Appeal Cases (1845-1851) are valuable Criminal Reports.

Before the time of Lord Campbell, *nisi prius* decisions were not regularly reported though some decisions of Holt and Lee are found in Lord Raymond's Reports and Strange and some decisions of Lord Kenyon in Peake & Espinasse. The peculiar circumstances of the time and the rapidity with which Lord Ellenborough decided cases brought in so much work and raised so many interesting points that it was found profitable to report the *nisi prius* decisions separately. The value of these *nisi prius* decisions is thus stated by Carrington in his preface to his Reports. He says: "If a case has to be tried which is difficult in its nature or in the evidence to be given on it, the greatest favour is to put a *nisi prius* report of a nearly similar case which will show him (counsel) what evidence to give, what objections to anticipate and so forth." He meets the charge that the decisions are those given in the hurry of *nisi prius* and as such valueless by saying that he has also noted wherever those decisions have been varied in *bank* or in error by reporting those judgments also. Points of evidence, *onus probandi*, etc., are generally be found decided only here; these hardly ever were decided in *bank*. Peake's Cases have the reputation of being correct Reports. The same, however, cannot be said of

Espinasse (1793-1807). In 13 Q. B. Cases 844, ***Small*** v. *Nairne,* Lord Denman said: "I am tempted to remark for the benefit of the profession that Espinasse's Reports, in days nearer their own time, when that want of accuracy was better known than it is now, were never quoted without doubt and hesitation and a special reason was often given as an apology for citing that particular case. Now, they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." It used to be said jocularly of Espinasse that he heard half and reported the rest. Lord Campbell's Reports (1808-1816) stand on a different footing. They are models of correctness and propriety of selection and have always been held in great repute. Lord Cranworth said of them in *Williams* v. *Bailey,* "On all occasions, I have found in looking at the Reports of the late Lord Campbell of Lord Ellenborough's decisions that they really do in the fewest possible words often lay down the law even more distinctly and accurately than is to be found in more lengthened reports and what is so laid down has been subsequently recognised as giving the true view of the law as applied to the facts of the case." But the very brevity has called forth some adverse comments also and so Maule, J. is found saying that a particular decision "is very shortly reported and we have frequently found, in referring to the attorneys, whose names are mentioned by the reporter at the end of the cases (the practice was begun by Lord Campbell) that the real circumstances of the case explain the apparent anomaly of the decision." Short statements are pleasing when a general idea only is desired but for a Judge or lawyer who wants to see how far a decision affords a precedent, brevity is far from being welcome and one would very much like to have not only the outline but also the filling in. Holt (1815-1817), Starkie (1815-1822), Gow (1818-1820), Dowling and Ryland (1822-1823), Ryan and Moody (1823-1826), Moody and Malkyn (1827-1830), Moody and Robinson (1831-1844), Carrington and Payne (1823-1841), Carrington and Marshman (1840-1842), Carrington and Kirwan (1843-1850), Foster and Finlason (1858-1865) with some gaps give us the *nisi prius* decisions of this period. Carrington and Payne also have not much of a reputation. Blackburn, for instance, said of Carrington and of Espinasse "neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated or that the opinion of the Judge was rightly understood." 8 Best and Smith 401—*Redhead* v. *Midland Company.*

The Chief Justices of the Common Pleas during the period we are dealing with are Lord Kenyon, Dallas, Giffard, Best, Tindal, Cockburn and Erle. Kenyon became Chief Justice of the King's Bench early and has been noticed in connection with the King's Bench Reports. So also Cockburn. Giffard became Master of the Rolls in 1825. His name is familiar to us for his dictum that on questions of Hindu Law, the British Court should decide as a Hindu Court of Justice would have done. Referring to Tindal, C. J., Lord Macnaughten says that there is no higher authority on the subject of agreements in restraint of trade than him. (1894) A. C. 553. We may notice here two of the puisne Judges of the Common Pleas who are also well known. One is Willes who is familiar to us as the Judge who delivered judgment in the Tagore case and by the respectful reference made to him by Pollock. He was reputed to be the most learned Judge of his day, his only rival in the claim being Blackburn. There was an impression that he would lead an argument in such a direction that he might carefully throw out a reference to *Bracton* or the *Mirror*. He would oftentimes crush the argument of many an ardent counsel by saying that the point had been decided the other way in the 15th century as reported in the Year Books. He is said to have set up the practice of half-night reading with wet towels round the head to keep himself awake—a course suggested by Lord Hale. Early morning in his constitutional, he used to meet Smith, an equally learned man, the author of the leading cases of which he became with Keating, an Irish importation like himself or Campbell before him, an Editor. Willes sat on the Law Procedure Commission and his recommendations became law. He was a great special pleader. The rules of pleading of the time made the unfortunate client the sport of lawyers and Willes revelled in them. By substituting the new system of the Common Law Procedure Acts his occupation was gone and as a compensation he was given a Judgeship in Common Pleas while yet 41 in 1855. Bramwell was his colleague in drafting the new rules of practice which governed the Courts of England till the Judicature Act was passed. His unrivalled reputation for learning, his freedom from prejudice and his logical force render his decisions in all branches of law respected and seldom questioned. One of his decisions, *Indermaur* v. *Dames* is the leading decision in tort on the doctrine of *trap*. His decision in *Tagore* v. *Tagore*—though not an unmixed good—is un-

doubtedly a remarkable judgment. Byles, the author of Byles on Bills, is even as a Judge an authority on that branch of law. When at the Bar, he was famed for his skill in the manœuvres which the rules of pleading permitted. One judgment of his might well be referred to here *Charlton* v. *Lings*. The question was as to whether under the Representation of the People, Act, 1867, which conferred the franchise "on every man" women also were entitled to come in. "No doubt," he says, "the word 'man' in a scientific treatise on Zoology or fossil organic remains would include men and women and children as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But in almost every other connection the word 'man' is used in contradistinction to woman. Women for centuries have always been considered legally incapable of voting for members of Parliament as such so as of being themselves elected to serve as members. In addition to all of which, we have the unanimous decision of Scotch Judges and I trust their unanimous decision and our unanimous decision will for ever exercise and lay this ghost of a doubt which ought never to have arisen." But the ghost has arisen and though laid again, it looked for a time that women had succeeded. Witness the recent attempt of women to sit in the House of Lords where they had the support of Lord Haldane and the Attorney-General—now Lord Hewart, C. J—though the point unarguable in the contrary sense. Bosanquet and Puller (1796-1804) report the decisions of Lord Eldon and Lord Kenyon as Chief Justices of the Common Pleas. Bosanquet and Puller N. S. (1804-1807), Taunton (1807-1879), Broderip and Bingham (1819-1822) and the first vol. of Bingham report the judgments of Dallas, C. J. and Alan Parke, J. The eighth volume of Taunton has not got the same high reputation as the other volumes as the cases were not reported by Taunton himself but were compiled from his notes. (*Per* Parke, B. in *Hadley* v. *Boxendale*). 1 Bingham contains the decisions of Giffard, C. J. who became Master of the Rolls in 1825. The judgments of Best, C. J. are reported in Vols. 4 and 5 of Bingham. In 6 Bingham we come to Tindal, C. J. In 1835 the sergeants ceased to have the monopoly of the Court of Common Pleas and Bingham began his new cases which continued up to 1840. Manning and Granger continue the Reports up to 1844. The Common Bench Reports (1845-1856), the new series (1856-

1865) and Harrison and Rutherford (1865-1866) bring us up to the Law Reports. Another series dealing with the Common Pleas cases are Marshall (1814-1816), Marshall and Moore (1817-1827), Moore and Payne (1828-1831), Moore and Scott (1831-1834), Scott's New Reports (1840-1845), Hodges (1835-1837), Arnold (1838-1839) and Drinkwater (1840-1841). Scott's New Reports are satisfactory for consultation but there is too much of expansion and repetition.

SUMMARY OF ENGLISH CASES.

COMMISSIONERS OF INLAND REVENUE *v.* BRIGADIER-GENERAL D'EWES COKE, (1926) 2 K B 246: 95 L J K B 694.

Income-tax —Super-tax —Company —Shareholders — Offer of new fully paid-up shares—Option to receive nominal value—Accumulated profits—Distribution of—Capital or income—Liability to tax.

A limited company decided to distribute among its shareholders a sum of £90,000 standing to the credit of its reserve fund as representing undivided profits. Resolutions were passed creating 90,000 new fully paid-up £1 shares, which were offered to the shareholders in proportion to their existing shares; an option was also given to the shareholders to accept the new shares or their money equivalent. One of the shareholders accepted some new shares and exercised the option to receive the money equivalent of the remainder of the shares allotted to him and the question arose of his liability to pay super-tax in respect of the whole allotment. *Held*, by *Rowlatt, J.*, the shares or the money equivalent thereof represented income and not capital and supertax was payable in respect thereof. (1921) 2 A. C. 171 and (1926) A. C. 395 distinguished.

GODMAN *v.* TIMES PUBLISHING CO. LTD., (1926) 2 K.B. 273: 95 L J K B 747.

Libel—Justification—Plea of—Conspiracy to defraud—Specific charge raised—Particulars referring to other fraudulent acts—Practice.

In a libel action the plaintiff complained of a paragraph in a newspaper charging him with having fraudulently entered into a conspiracy to defraud the underwriters of a ship V. The defence was one of justification and in the particulars of

justification, the defendants referred to matters relating to two other vessels in respect of which also the plaintiff was alleged to have conspired to defraud the underwriters. An application was taken out to have those particulars relating to other vessels struck out as irrelevant. *Held,* the relevancy of those particulars could be gone into only at the trial of the case, and the particulars should not be ordered to be struck out at an interlocutory stage.

The scope of particulars of justification in a libel action considered.

BETTS *v.* CLARE AND HEYWORTH, (1926) 2 K B 289: 95 L J K B 872.

Income-tax—Company—Profits—Mode of ascertaining—Three years' period not available for average—Broken period—Income-tax Act, 1918, *Sch. D, Cases* I & II.

A firm began to do business for the first time on 1st March, 1919, and made up its accounts up to 31st Dec. 1919, showing a total profit of £1,000. Thereafter the business was sold *en bloc* to a company consisting of the same persons as from 1st Jan. 1920 and the accounts of this company for the 3 months ending with 31st March, 1920 showed a profit of £12,150. For the purpose of assessing it to income-tax for the year ending 5th April, 1920, the question arose whether it should be on the basis of the profits of the 10 months period ending with 31st December, 1919 or on the basis of the profits of 13 months ending with 31st March, 1920. *Held,* by a majority of the Court of Appeal (*Scrutton, L. J.* dissenting) as the three years' period for calculating the average was impossible in the case, the average should be taken to be twelve-thirteenths of the total profits made between March 1, 1919 and March 31, 1920. Decision of *Rowlatt, J.* in (1925) 2 K B 402 reversed.

NEWMAN *v.* SLADE, (1926) 2 K B 328: 95 L J K B 894.

Landlord and tenant—Weekly tenancy—Notice to quit—Period of—Calculation.

In the case of a tenancy from week to week, unless a contrary intention appears, either party can determine it by a week's notice. A notice given on the day of the week corresponding to that on which the tenancy commenced and expiring on the corresponding day of the following week is good. It need not be one of seven clear days.

NOBLE *v.* HARRISON, (1926) 2 K B 332: 95 L J K B 813.

Nuisance—Highway—Branch of tree overhanging—Fall of branch—Passing vehicle damaged—Liability of owner of tree.

A branch of a tree growing on the land of the defendant overhung a highway at a height of thirty feet above the ground. It was found as a fact that owing to a latent defect which was not discoverable by any reasonable inspection, the branch broke and fell down causing damage to the plaintiff's vehicle as it passed along the highway. In an action for damages, *held,* (1) the principle enunciated in *Rylands* v. *Fletcher* would not apply and make the defendant liable, as the tree is not a dangerous thing which every owner grows at his risk and peril; and (2) nor was the branch a nuisance as it was at such a height that it did not obstruct traffic on the highway and the defendant did not and could not have known of the actual danger.

In re SCHINTZ : SCHINTZ *v.* WARR, (1926) 1 Ch. 710: 95 L. J. Ch. 393.

Practice—Company established abroad—Service of notice out of jurisdiction—Necessary or proper party—Clause in the Articles of Association for decision of disputes before a particular tribunal—Breach of trust by co-trustees—Action for removal and damages—Validity of resolution challenged—Foreign Company if a proper party.

The Articles of Association of a Company established in France provided that all disputes relating to the affairs of the Company were to be decided by a particular French tribunal. The plaintiff, one of several trustees under a settlement comprising a large number of shares in the French Company and also a beneficiary thereunder, sued her co-trustees for breach of trust, in that the latter voted without her consent in favour of a resolution of the French Company to capitalize part of the reserve fund, claiming removal of the co-trustees and damages against them. One of the reliefs claimed was a declaration that the said resolution was invalid and for that purpose the Company was impleaded as a defendant, and permission was asked for to serve the writ out of the jurisdiction. *Held,* by the Court of Appeal reversing the orders of *Astbury, J.* and *Lawrence, J.* that the action being mainly based on breach of trust, the validity of the resolution was only a subsidiary issue ; and the Articles of Association having fixed

upon a French Tribunal as the *forum conveniens*, a decision of the English Courts on the validity of the resolution would not be final; the Company was neither a necessary nor a proper party to the action and leave to serve the writ out of jurisdiction should not be granted.

Considerations before giving leave to serve a writ out of jurisdiction discussed.

DUKE OF SUTHERLAND *v.* BRITISH DOMINIONS LAND SETTLEMENT CORPORATION, LTD., (1926) 1 Ch. 746.

Practice—Interrogatories—When to be granted.

The administering of interrogatories is a step more often desirable than undesirable and to be encouraged rather than to be discouraged, because they not infrequently bring an action to an end at an earlier stage than otherwise would be the case. A party has a right to interrogate with a view of obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. Discovery is not limited to giving the plaintiff a knowledge of that which he does not already know but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the defendant. The Court will exercise a discretion in refusing to enforce it, where it is remote in its bearings upon the real point in issue and would be an oppressive inquisition.

ALBISON *v.* NEWROYD MILL, LTD., 95 L.J.K.B. 667.

Workmen's compensation—Accident of trivial nature—Notice given some weeks later—Reasonable cause for delay—"As soon as practicable"—Meaning of.

A girl of fifteen working in a cotton factory was injured by a bobbin falling on her nose. There was some bleeding and the girl went to her immediate superior, who wiped it. Two days later, as there was swelling, poultice was applied by her mother and as the nose was still getting worse, the girl went to a doctor seven weeks after the accident; he found it septic and then gave her the necessary treatment. It was only then that she gave notice to her employers of the accident and later claimed compensation. *Held,* by the Court of Appeal (*Pollock, M. R.* dissenting) notice need be given only when the workman realises he has suffered an injury entitling him to compensation and under the circumstance of the case, the mere fact that notices were put up in the factory enjoining workmen to give notice of even the slightest accident does not disentitle the claimant to compensation.

GREENHILL *v.* FEDERAL INSURANCE CO., 95 L. J. K. B. 717.

Marine insurance—Goods shipped—Pre-carriage and damage—Facts not disclosed—Materiality of.

In an action on a marine insurance policy when the defence is wrongful concealment of material facts, the defendants have to prove a wrongful concealment of a fact then known to the plaintiffs and material to be known to the defendants and material to the risk of the said policy. A person tendering cargo for insurance is under a duty to disclose to the underwriters the condition of the cargo, and if the insurance effected without disclosing the fact of a pre-carriage and damage caused by exposure to serve weather, the policy is vitiated. *Boyd* v. *Dubois,* 3 Camp. 133 dissented from.

FIELD *v.* CURRICK, 95 L. J. K. B. 756: (1926) 2 K. B. 374.

Landlord and tenant—Covenant to repair—Extent of—Buildings put later.

If a lessor demises a house and there is an express covenant to repair, the lessee is bound by it. A general covenant to repair includes not merely buildings existing when the demise is made but all those which may be erected during the term. If however the covenant to repair is only one to keep in repair the demised premises, it applies to those existing at the date of the lease only, unless the new buildings are made part of the old ones.

GUEST *v.* T. GASTON & CO., 95 L. J. K. B. 759.

Workmen's compensation—Arising out of and in the course of employment—Attempting to board a tramcar while in motion—Act forbidden—Death by accident—Workmen's Compensation Act, 1923, *S.* 7.

A person who had been employed to supervise the weighing of cotton at various warehouses in Liverpool was allowed to use the tramcars to go from one place to another. One day while attempting to board a tramcar in motion, in contravention of the tramway rules, on his way to the head office from a warehouse, the man fell down and was killed. *Held,* the mere fact of his attempting to get into a tram in motion, contrary to the rules, does not mean that the accident did not arise out of and in the course of employment. Scope of S. 7 of the Workmen's Compensation Act, 1923, referred to.

HINES *v.* TOUSLEY, 95 L. J. K. B. 773.

Workmen's compensation—Collision with dog—Injury—Compensation awarded against employer—Right to claim indemnity against owner.

A waitress while coming downstairs in the course of her employment collided with a dog and fell down breaking her leg. She applied for compensation as against her employer, whereupon the latter joined the owner of the dog as a third party and claimed an indemnity against him. *Held*, in the absence of anything to show that the dog was vicious, and not well-behaved, the owner is not liable.

UNITED STATES SHIPPING BOARD *v.* FRANK STRICK & Co., 95 L. J. K. B. 776: (1926) A. C. 545.

Shipping—Charterparty—Construction—Cargo to be loaded on notice of readiness to load—Turn to load—Delay in—Demurrage—Claim for.

The terms of a charterparty provided for loading cargo "subject to port regulations in regular turn as customary.... ....commencing when written notice is given of steamer being ready to load." There being only one berth, steamers were berthed in the order of arrival and had to await their turn. The steamer arrived at port on 30th July, 1920, and the next day the master gave the written notice of readiness to load, but her turn to the berth came only on 26th August, 1920. In an action for demurrage for the period of detention, *held* by a majority of the House of Lords (*Lord Sumner* and *Viscount Haldane* dissenting) the obligation to load came into force only when the ship's turn to load arrived and hence no demurrage was payable.

REED *v.* SEYMOUR, 95 L. J. K. B. 796.

Income-tax—Benefit match for professional cricketeer—If assessable—Gate money—Nature of.

The gate moneys received during a benefit match held by the Kent County Club for the benefit of a professional cricketeer were under the rules retained by the Committee and invested for his benefit. On retiring from the profession the money used to be utilised in purchasing a farm for him. On a question arising whether the same was assessable to income-tax, *held*, by a majority of the Court of Appeal (*Sargant, L. J.* dissenting) the gate money was received in respect of employment and as it represented profits of office, it was taxable. Decision of *Rowlatt, J.* in (1926) 1 K. B. 588 reversed.

THOMAS *v.* TODD, 95 L. J. K. B. 888.

Company—Receiver—Voluntary liquidation—Effect of—Receiver personally liable on subsequent contracts.

After a company went into voluntary liquidation, a Receiver who had been previously appointed by a debenture-holder entered into a contract to continue the services of some musicians as before. *Held,* he could no longer bind the company, but was personally liable on the contract.

JOTTINGS AND CUTTINGS.

The Late Sir John Edge.—The death of Sir John Edge at the advanced age of eighty-five has followed rapidly upon his resignation of his seat on the Judicial Committee last May. Sir John had been a member of the final Court of Appeal for the Empire for nearly eighteen years, having been appointed in 1909, when already sixty-eight years of age. It is an open secret that for a decade or more after his appointment most judgments of Indian Appeals were either drafted by him or submitted to him for revision ; the somewhat over-elaborate reference to authorities which mark these judgments is generally understood to have been a token of the remarkable conscientiousness and meticulous care with which he attacked this important task. Sir John was a member first of the Irish and afterwards of the English Bar ; but it was as Judge of the High Court of Allahabad in India, to which he was appointed in 1886, that he first attracted the attention of jurists. It soon became known that the Indian Bench had produced a really great Judge ; he earned in India a celebrity not unlike that of Mr. Justice McCardie in England ; and like all Indian and Colonial Judges of the first order, he soon became known in the spirit and the records of cases to practitioners at the Privy Council Bar. Sir John Edge was the most versatile of men ; while a Judge, he actually served as Commanding Officer of the Allahabad Volunteer Rifles, and as Vice-Chancellor of Allahabad University. On his return to England, he enjoyed the remarkable honour, unique, we believe, in the case of ex-Judges who have not also been Indian Civil Servants, of being appointed one of the Council of India, upon which he served until his appointment to the Judicial Committee. While his love of exactitude and his tendency to be critical made argument before him a somewhat strenuous task, his ever-flowing courtesy and his unaffected kindness earned him universal esteem both in India and in England.

—*The Law Journal,* August 14, 1926; p. 116.

Baldness and Legal Wigs.—The British Association, in its Anthropological Section, discussed learnedly last week a scientific problem of some practical interest to the average legal practitioner who has to wear a wig in Court. That problem was the cause of baldness, said to be on the increase. Professor Fleure explained it as due to increased brain-energy, on the ground that hair-growth absorbs a great deal of organic power which, in the bald man, is utilised physiologically for the development of brain-cells. But we find it difficult to reconcile that theory with the fact that Common Law barristers are usually balder than their Chancery brethren, and that both have luxuriant hair than conveyancers—a fact of which any observant person can easily satisfy himself. Our own view is rather the commonplace one that the wearing of the wig by the Court practitioner is deleterious to the growth of hair; this accounts for the comparative immunity of the conveyancer from baldness. *A propos* of wigs, perhaps some readers of Walter Scott will recall how, in "The Antiquary," an old barber explains the revolutionary tendencies of his age by the obsolescence of the practice of wearing wigs amongst gentlemen. "There are nae mair, than twa Lairds in the parish who wear wigs," he says; "hoo, then, can ye expect the common folks to respect the gentry?"

—*The Law Journal*, August 14, 1926, p. 117.

The Judicial Committee.—The appointment of Lord Sinha to be a member of the Judicial Committee of the Privy Council under S. 1 of the Judicial Committee Act of 1833 is a well-earned mark of recognition of a long period of able and devoted service to the Empire. The section in question, after providing that Privy Councillors, being the holders or past-holders of certain judicial appointments in Great Britain, shall form a committee to be styled the Judicial Committee of the Privy Council, enacts that "any two other persons being Privy Councillors" may from time to time be appointed to be members of the Committee. Lord Sinha has been appointed under this provision, and the fact that the other of the two appointments is held by Lord Oxford and Asquith adds to the honour thereby conferred upon him. The position is purely honorary. Sir John Wallis, who was recently appointed to the same Committee under S. 2 (1) of the Appellate Jurisdiction Act of 1908—also an honorary appointment—has been transferred to fill the vacancy caused by the resignation of the late Sir John Edge. Sir John held one of the appoint-

ments created by S. 30 of the Judicial Committee Act of 1833, by virtue of which a sum of £400 a year is payable to two retired Indian Judges appointed to the Committee, who shall attend its meetings, "as an indemnity for the expense which they may thereby incur". As our readers will remember, the Judicial Committee Bill now before Parliament proposes to repeal S. 30 of the Act of 1833—without prejudice to the rights of persons entitled under it at the passing of the Bill—and to create two new posts, each carrying a salary of £2,000 a year, with the possibility of an addition not exceeding another £2,000 a year out of the revenues of India.

—*The Law Journal*, August 28, 1926, p. 143.

The Adoption of Children.—After many years of effort, a Bill to legalise, in proper cases, the adoption of children, has become law, and will come into operation at the beginning of next year. The Bill was drafted by the Committee appointed by the Home Secretary in 1924, and presided over by Mr. Justice Tomlin. That Committee's reports were fully dealt with in our columns when they were presented, and it is unnecessary for us to do more at the moment than to express the satisfaction which will be felt by all those who have ever been called on to advise persons desiring to adopt a child, that the unsatisfactory and anomalous state of the law on the subject is about to be brought to an end. A little more than a year ago the terms of reference of Mr. Justice Tomlin's Committee were extended to include an enquiry into the working of the provisions of the Children Act, 1908, as to protection of infant life and visitation of voluntary homes. The report of the Committee on this branch of the subject has now been published (Cmd. 2711). This report is divided into two parts, the first dealing with the protection of infant life, with which Part I of the Children Act is concerned, and the second dealing with the inspection of voluntary homes, the subject of S. 25 of the same Act. As to the protection of infant life, the Committee point out that Part I of the Act was intended to be in the nature of a police measure directed to the abolition of "baby farming," and they are satisfied that it has proved efficient in this respect, and that as the mischief aimed at has diminished, the value of the legislation as a welfare measure has come more and more into prominence. They recommend a number of amendments, chiefly of detail, but they are satisfied that there is no need for any marked change in the substance of the law. The chief recommendation in this part of their enquiry is that Poor Law Guardians should cease to be the local autho-

rity for the purpose of Part I of the Act. With regard to the second branch of the subject, the inspection of voluntary homes, the Committee report that the provisions of S. 25 of the Act of 1908 are inadequate, and they recommend that that section be replaced by another, outlined in the report, providing for the furnishing of particulars of voluntary homes as they are founded, giving a comprehensive definition to the word "home," providing for the visitation and inspection of homes, and giving power, in proper cases, to order the removal of children from homes in which their safety or welfare is endangered.

—*The Law Journal*, August 28, 1926, p. 144.

Justice in Italy.—Whatever views one may hold as to the Fascist system of government, there will be few, if any, British lawyers who will approve of the decision of the Fascist Directorate, reported in the *Times* of Aug. 23, that lawyers in Italy, holding the Fascist ticket, will in future be forbidden to take up the defence of clients who are "anti-Fascist," or who are in conflict with the principles of the Fascist Party, in all cases of a political character. No special ban is made, it is stated, for ordinary cases, but in cases of an "anti-social character" or of "grave immorality," in which anti-Fascists are involved, the Secretary-General of the Fascist Party will use his "discretional judgment" in calling the attention of Fascist lawyers to the political views of their clients. Taken in conjunction with the Decree regulating the position of the Bar in Italy, a brief account of which recently appeared in our pages—61 L J p. 526—it appears to be doubtful whether an anti-Fascist accused of an "anti-social" or "grossly immoral" offence will be able to obtain adequate representation at his trial. We are glad to know that there is no tendency in this country on the part either of the public or of lawyers to consider, in the selection of advisers or in the acceptance of instructions, the political views of either party. Only last week we observed that a miners' leader charged with an offence against the Emergency Regulations was defended by an eminent King's Counsel, lately a well-known Conservative Member of Parliament. Such a fact speaks volumes for the confidence which all classes of the community have in the freedom of the members of our legal profession from political predelictions when engaged in the practice of their profession.

—*The Law Journal*, September 4, 1926, p. 156.

Anonymous Witnesses and their Historical Origin.—In the Bayswater murder case the police have been greatly ham-

pered in their inquiries by the refusal to come forward of the person (presumed to be a woman) who sent to the police an anonymous letter giving information about the crime. Assuming that the letter is not a hoax, or a malicious attempt to fix the crime on an innocent person, or an attempt of the criminal to mislead Scotland Yard, the natural question arises, why has the writer preserved his or her incognito? Fear of revenge by a gang of criminals is a possible explanation; but we fancy there is also another, namely, the dislike of being taken to a police-station and there severely cross-examined for hours, which is too often the fate of persons whose information the police desire. Such persons seem never to be examined in their homes, but nearly always are taken to the police-station. This is done, we understand, because the police believe the awesome character of the place has a good "moral effect" on recalcitrant witnesses who attempt concealment. But this plan defeats its own purpose, since it renders the average timid but respectable citizen very reluctant to come forward at such an unpleasant cost to his nerves and his personal dignity. Until 1875, however, when the practice of committing witnesses to prison between the police proceedings and the trial, unless they could find two householders to go bail for their appearance at the trial, was abandoned in favour of the modern practice of binding over witnesses on their own recognizances to attend the indictment, witnesses for the Crown frequently suffered a very real hardship. Many of them, who could not find bail, were regularly detained in prison until the trial. Absurd as this now seems, it was only abolished in 1875 as the result of the personal intervention of Disraeli at the request of his Whip, Sir William Fraser, who tells the whole story of his successful efforts to secure this reform in one of the most fascinating episodes related in his "Disraeli and His Day".

—*The Law Journal,* September 4, 1926, p. 156.

Sergeant Ballantine's Story of Ben Ahmed.—Apropos of the hardships of Crown witnesses in the days before 1875, Sergeant Ballantine tells in his "Experiences" with all his own inimitable humour the true story of a case which he himself came across. There lived in Clerkenwell an itinerant ice-cream vendor, a Turk named Ben Ahmed. Some miscreants set out to avenge on him the persecution of Christians in Turkey by assaulting him, and robbing him of all his till money in the open street. They were seen, chased, and captured by the police; and in due course a police-magistrate committed them

for trial at Quarter Sessions. They were released on bail and at once absconded. The prosecutor was bound over, too, to give evidence at the trial. But he had no friends whom the police would accept as bail; therefore he was committed to prison pending the trial. The trial, when its time arrived, was adjourned till the next sessions because the defendants did not surrender to their bail. Adjournment followed adjournment for a number of years; meanwhile, poor Ben Ahmed remained in jail. At last the Crown got tired of the affair and entered a *nolle prosequi;* otherwise Ben Ahmed must have remained in jail for the rest of his natural life. Released at last, he came back to Clerkenwell a pauper; a rival had seized his pitch and his poor savings had disappeared on the purchase of prison comforts, such as tobacco and coffee. Unable to earn a living, he was run in for vagrancy, and ultimately deported to Constantinople. There, Sergeant Ballantine ironically suggests, he doubtless became an ardent member of the Progressive party who sought to introduce into Turkey the enlightened criminal jurisprudence of the Western world.

—*The Law Journal,* September 4, 1926, p. 156.

The Disciplinary Powers of the Law Society.—In our last issue we printed a letter from a correspondent calling attention to the recent case in which the suspension, by the Statutory Committee of the Law Society, of a solicitor who had been convicted of an assault, was confirmed by the Court of Appeal. Our correspondent commenced by raising a technical point as to the effect of S. 45 of the Offences against the Person Act, 1861, but the major part of his letter is devoted to the contention that the disciplinary powers with regard to solicitors ought only to be exercised in cases of technical professional misconduct. With regard to the first point, his suggestion is that the section in question, which provides that where a person, against whom a complaint in respect of an assault has been preferred "by or on behalf of the party aggrieved," shall, after having been convicted, have paid the fine imposed, or suffered the imprisonment awarded, he shall be released from "all further or other proceedings, civil or criminal, from the same cause". There is nothing in any of the reports of the case in question to which we have had access to indicate whether or not this section was brought to the attention either of the Committee or of the Court, but whether this was done or no, we cannot think that it would have made any difference to the result, for it seems to be plain that the section refers to further proceedings on the part of the "person aggrieved".

It is quite obvious that there might be cases in which assaults by professional men would constitute very grave "professional misconduct," and it can hardly be seriously suggested that the section in question was intended to do more than to relieve a defendant in an assault case from being sued civilly, or further prosecuted criminally, by the victim of the assault.

—*The Law Journal,* September 18, 1926, p. 181.

"Professional Misconduct".—As to the second part of the letter in question, it is surprising to find a gentleman who states that he has been in practice for over half a century suggesting that "it has been generally understood that only cases of professional misconduct are considered by the Law Society". The law on this point has been settled ever since the case of *Re Weare,* 1893, 2 Q. B. 439, was decided by a full Court of Appeal, consisting of Lord Esher, M. R., Lindley and Lopes, L. JJ. It was there perfectly clearly and definitely laid down that a solicitor may be struck off the rolls, or otherwise punished, for an offence which has no relation to his character as a solicitor. Indeed, as appears from Lord Esher's judgment, the point had been decided so long ago as 1778, when Lord Mansfield, in *Re Brownsall;* 2 Cowp. 829; said that the fact that an attorney had been convicted of, and punished for, an offence not connected with his professional character, was liable to be struck off the roll in respect of that conduct. So far as the merits of the case which gave rise to our correspondent's letter are concerned, we are quite satisfied that the view of the profession as a whole is that the Statutory Committee took, to use the words of the Master of the Rolls, a right, and perhaps even a lenient, view of the appellant's conduct. So far as our correspondent suggests that solicitors are dissatisfied with the constitution of the Statutory Committee or with the way in which it performs its difficult and unpleasant duty, we are confident that he is completely mistaken.

—*The Law Journal,* September 18, 1926, p. 182.

Murderers wrongly sentenced.—Reformers of English Criminal Jurisprudence have received a valuable ally by the entrance into the lists on their behalf of Sir Edward Marshall Hall, K. C., who has recently denounced in the Courts and in the press the retention in our law of matters which have disappeared from the law of murder in all other civilised countries. Sir Edward is the foremost advocate at the criminal bar of our generation, and has been concerned in a far greater number of criminal *causes celebres* than any other living practitioner. Moreover, he holds Conservative

opinions politically, and has never been accused or suspected of the standpoint which its opponents denounce as "Sentimentalism" or "Humanitarianism." His views are therefore entitled to the respectful consideration due to his absence of partisan bias in favour of the advanced point of view, and to his quite unique forensic experience. It was, perhaps, a red letter day in the history of criminal law reform when he contributed to the press a powerful indictment of recent practice under which, he said, murderers only technically guilty have been sent to the scaffold in opposition to all enlightened public opinion.

—*The Law Journal*, September 18, 1926, p. 183.

BOOK REVIEWS.

"TRIAL OF KATHARINE NAIRN." Edited by W. Roughhead. Notable British Trials Series. Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

In the volume under review, we are taken more than a century and half back to the sixties of the eighteenth century and this time to the High Court of Justiciary in Edinburgh. The trial was before a Bench of six Judges and 15 Jurors and lasted 43 consecutive hours. The interest to the layman and the ordinary reader is that the volume gives the details of yet another story of guilty love resulting in incest and shows how a young wife, not many months married, takes away the life of her husband by poison supplied by her paramour who is only her husband's younger brother. Into the details of this story, it is not our purpose to travel, but we can confidently say it is one of absorbing interest and recommend it to our readers.

The proceedings of the trial in Scotland afford very interesting reading to the lawyer. The language of Scottish law—not always very familiar to the ears of the modern lawyer—and the long indictment which opens the proceedings, and which sets out the charge and the minute details of the evidence shortly to be let in, form a strange contrast to the brief and concise charges of our Courts to-day. There is no opening of the prosecution case, and that accounts for the long indictment. Then comes the plea of "Not guilty" followed by a long address of the defence counsel on the case in general and legal objections in particular, and the *interlocutor* of the Judges on the legal objections. It was the

practice in those days that after a jury was once chosen, the Court could not be adjourned till the verdict was given and hence we see the strange spectacle of the trial lasting 43 consecutive hours. The guilty pair were found guilty of both charges—incest and murder, and then followed a strange procedure. A Plea in arrest of Judgment was raised and elaborate arguments setting forth objections to the mode and form of trial—which one expects in modern days to be raised before a Court of Appeal—and they had to be adjudicated on before sentence could be pronounced. Katharine as a last resort claimed respite on the ground of pregnancy and the matter was remitted to five skilful midwives—not twelve matrons as in England.

It is not necessary to say that the usual features of the Notable Trials Series are present—the historical narrative of facts forming an Introduction and many interesting Appendices. Appendix II sheds much light on the preparation of the Crown cases in those days, while Appendix IX gives the correspondence which passed between the Scotch Law Officers and the Secretary of State relating to this trial. We heartily recommend the volume to our readers.

"MADRAS LOCAL AND MUNICIPAL ELECTION MANUAL" printed at the M.L.J. Press, Mylapore.

We have heard more than one Judge of the Madras High Court complain, when hearing a Civil Revision Petition arising out of an Election Petition, of the absence of a handy publication containing all the rules framed by the Local Government under the various Municipal Acts. The volume under review contains all the provisions relating to elections under the Madras City Municipal Act, the Madras District Municipalities Act and the Madras Local Boards Act, and all election rules framed thereunder, as revised up to 1st October, 1926. We are sure it supplies a long-felt want and the neat get-up and printing add to its value. The volume is priced at Rs. 2.

"MADRAS MUNICIPAL ELECTION RULES" by Mr. E. S. Sunda, B. A., B.L., Vakil; Madura.

This neat little book is a companion to the author's "Law of Municipal Elections" published last year and brings up all the rules framed by the Local Government up to June, 1926. We are sure the two books together will be of great use to the public in general and the legal profession in particular.

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LAW REPORTS*.

IX. ENGLISH REPORTS.

Anstruther reports the judgments of Eyre, C. B., Forrest and Wightwick of Macdonald, C. B., Price of Thompson, Richards and Alexander who were successively Chief Barons. Reports of McCleland (1824), McCleland and Younge (1825), Younge and Jervis (1826-1830) and Crompton and Jervis contain decisions of Alexander, C. B. Anstruther's reports have been pronounced to be very slight authority. It is surmised that it may be due to the feebleness of the Judges that presided over the Court at the time rather than to any deficiency in the reporter. Four of the Barons, Barons Graham, Hobart, Thomson and Wood used to be facetiously called four boxes, chatter-box, snuff-box, band-box and tinder-box. In fact, during this period, the Exchequer Court had very little reputation and in consequence work had gravitated largely to the King's Bench. It was only when Lord Lyndhurst went to the Exchequer Court and Bayley and Parke became Barons its reputation rose. Lyndhurst succeeded Lord Eldon as Chancellor in 1827 and continued such till 1830. In 1831 he became Chief Baron—a step down with no precedent. Though a man of great ability, he had no legal ambition and would not bestow any attention on legal studies. He relied on Bayley who came from King's Bench and had a reputation for being a learned and laborious lawyer. The one important judgment to his credit while Chief Baron is *Small* v. *Attwood.* His judgments as Chief Baron begin with 2 Crompton and Jervis and continue through Crompton and Meeson (1832-1834), and Crompton, Meeson and Roscoe (1835) when he became Chancellor again and

*The ninth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

his place was taken by Abinger, whose judgments will be found reported in the remaining volumes of Crompton, Meeson and Roscoe and in the first eleven volumes of Meeson and Welsby. Pollock succeeded Abinger and continued Chief Baron right up to the period of the Law Reports. Both Abinger and Pollock were great lawyers but the most dominating personality during the period in the Exchequer Court was undoubtedly Parke, B. The further series dealing with the Exchequer Court are Exchequer Reports (1847-1856), Welsby, Hurlston and Gordon (1847-1856), Hurlston and Norman, and Hurlston and Coltman. The other distinguished Judges are Alderson, B., Rolfe, B., Martin, B., and finally Bramwell B. who became Lord Bramwell. Rolfe B. as Truro became Lord Chancellor. Martin, B. was the son-in-law of Pollock, C. B. and that circumstance helped him immensely while at the bar. Pollock was supposed to show his partiality in an obvious manner. Martin, B., though not a great lawyer, was a sound Judge. According to Lord Campbell, though he was not good at English composition his written judgments somehow read well.

Baron Bramwell's is a very familiar name to lawyers. He took the place of Baron Parke.He was a very successful lawyer. A successful lawyer does not always make a good Judge. For instance, Lord Abinger, unmatched as an advocate, made an indifferent Judge, so also Lord Lyndhurst. On the other hand, Blackburn on whose appointment in 1859 *The Times* asked —Who is Mr. Blackburn ?—made an excellent Judge. Baron Bramwell made a good Judge and an extremely good one at that. He was a great Common Law lawyer and made no secret of it or of his ignorance of equity and possibly of a certain amount of contempt for it. Nevertheless, he was fully alive to the defects of Common Law and its procedure and he was one of those who was responsible for the Judicature Act. With Blackburn and Coleridge he sat in the Judicature Commission. He became Lord Justice of Appeal in 1876 and administered the new Acts fusing law and equity. It was, however, as a Judge of the first instance that Lord Bramwell's gifts were at their best, because there the penetration, the logical directness, the high initial velocity of his intellect, his workmanlike knack of mastering facts, assaying and applying law appeared to the best advantage. As a Judge of the Appellate Court, he appeared to disadvantage when compared with Bowen or Selborne with their subtle and impressive attributes which make great Judges of Appeal.

But his admirable skill in simplifying the questions at issue and clearing the ground were of the greatest assistance even in the Court of Appeal. ' It is said of him that as a Judge he was always learning. Capacity to adapt oneself to the changed circumstances is a rare capacity and Lord Bramwell had it in full abundance and evinced it till the last day of his life.

Tyrwhitt (1830-1835), Tyrwhitt and Granger (1836), Gale (1835-1836), Murphy and Hurlston (1836-1837), Horn and Hurlston (1838-1839), Price's Notes (1830-1831), Hurlston and Walmsley (1840-1841) are some other reports that deal with the Exchequer decisions of a part of this period. The Exchequer Court had an equity jurisdiction till it was transferred to the Chancery in 1842. Wilson (1817), Daniell (1817-1819), Younge (1830-1832) and Younge and Collyer (1833-1841) deal with the judgments of the Court on that side.

Turning to Equity the judgments of Eldon are reported in the last eleven volumes of Vesey Junior in Cooper (1815), Merivale (1815-1817), Swanston (1818-1819), Wilson (1818-1819), Jacob and Walker (1819-1821), Jacob (1821-1822), Turner and Russel (1822-1824), and Russel (1826-1829). Sir William Grant was Master of the Rolls till 1818 when Plumer took his place. He was a great Equity Judge whose judgments by reason of their excellent form are better reported in Vesey Junior than those of Lord Eldon. In 1826 Lord Lyndhurst became Master of the Rolls. His judgments as Master of the Rolls are reported in Russel. In 1827 he became Chancellor and his judgments as Chancellor are reported in Russel, Russel and Mylne and Phillips (1841-1849). The only judgment of importance by him as Chancellor is said to be the judgment in *Fairman* v. *Fairlie* reported in Moore's Indian Appeals. He relied on his Masters of the Rolls and Vice-Chancellors. He had a greater propensity to affirm than to reverse. In this, his successor Lord Cottenham, who was also for a small time Master of the Rolls before he became Lord Chancellor, was a great contrast, although he was quite inferior to the former both in grasp of intelligence and in general acquirements. He did not even acknowledge that there was a presumption in favour of the decree appealed against. The wags used to say that with him every decree was wrong till the contrary was clearly proved, odds being two to one against Shadwell, V. C. and three to one against

Knight Bruce, V. C. His successor on the first Chancellorship was Lord Brougham who held office from 1830 to 1834. Lord Brougham was not a great Master of Equity, his equipments in that direction being of the poorest. Lord Cottenham became Lord Chancellor again in 1835. In spite of the weakness above referred to, and his inferiority to Lord Lyndhurst, he was regarded a consummate Equity Judge and commanded more credit. Mylne and Craig (1836-1848), Craig and Phillips (1841), Phillips (1841-1849) and Hall and Twells contain judgments of Brougham, Lyndhurst and Cottenham. In Macnaughten and Gordon (1849-1851) Lord Truro's judgments will be found. De Gex, Macnaughten and Gordon report the judgments of Lord St. Leonards, of Lord Cranworth and of the Lords Justices in Appeal in Chancery who were appointed in 1854. The first Lords Justices in Appeal to be appointed were Knight Bruce and Turner. This Bench lasted for 21 years and during all that period had hardly a weak Judge. Turner and Knight Bruce are distinguished names in Chancery and are very familiar to Indian lawyers as responsible for some of the leading judgments reported in Moore's Indian Appeals. *Hanooman Pershad Pandey* is a judgment of Knight Bruce, *Soorajmoone Dassee* of Turner. The beautiful English periods of these Judges has become a lost art in England. The subsequent Lords Justices were Rolt, Cairns, Selwyn, Wood, Giffard, the last ones being James and Mellish. In De Gex and Jones you get Lord Chelmsford's judgments. He was Lord Chancellor for a short time. Though not very distinguished, he was not badly thought of. In 1859 Lord Campbell became Lord Chancellor and continued till his death in 1861. His judgments as Lord Chancellor will be found in De Gex, Fisher and Jones. In 1861 Lord Westbury became Lord Chancellor. As a Judge he was very distinguished though his nepotism was equally notorious and ultimately he fell on account of the conduct of his son. His judgments and those of Cranworth will be found in De Gex, Jones and Smith. Both these eminent lawyers' judgments are also to be found in the Law Reports. As at Common Law, in Equity reporting also we see at this period considerable specialising. The Court of the Master of Rolls and the Vice-Chancellor's Courts are separately reported. Tamlyn (1829-1830) reports Leach's judgments as Master of Rolls, Keen (1836-1838) and the first volume of Beavan of Lord Langdale. Romilly's judgments are to be found in the other

volumes of Beavan. A Vice-Chancellor was appointed for the first time in 1813. Maddock, Simons and Stuart (1815 and 1822) report judgments of Plumer and Leach, V. C., Simons of Shadwell and Hart. Simons New Series (1850-1852), Drewy (1852-1859) and Drewy and Smale (1860-1866) report Kindersley, V. C. Knight Bruce, V. C. is reported in Younge and Collyer (1841-1843), Collyer (1844-1845) and 1 to 4 De Gex and Smale (1846-1852). 5 De Gex and Smale reports Parker, V. C.'s judgments. Smale and Giffard (1852-1857) and Giffard (1857-1865) report judgments of Stuart, V. C. In 1841 two additional Vice-Chancellors were appointed to meet the additional work transferred from Exchequer to Chancery. The first persons to be so appointed were Knight Bruce and Wigram. Wigram's judgments are reported in Hare. Turner's judgments in Hare and Kay and the other reports Kay and Johnson (1854-1858), Johnson (1859), Johnson and Hemming (1860-1862) and Hemming and Miller (1862-1865) report Sir William Page Wood's judgments. Sir William Page Wood became subsequently Lord Chancellor as Hatherley. He was an altogether exemplary man. His punctuality was proverbial. Tradesmen set their watches, it is said, as the Vice-Chancellor passed. He mastered every detail in the argument and dealt with it and the working of his mind in full detail in his judgment. His judgments were in consequence very long and Lord Campbell, while affirming his judgment, ventured to suggest that he would have arrived at the conclusion more satisfactorily if he compressed his observations and further recommended written judgments in place of oral judgments. This called forth a protest from Lord Romilly, M. R., and Kindersley and Stuart, his brother Vice-Chancellors. He never delivered a written judgment but once. His rambling judgments tried the reporters sorely. He was an efficient Judge but hardly left a mark on the legal literature of the day. He was much more satisfactory as Vice-Chancellor than as Chancellor and Lord Justice which he became before becoming Chancellor. In a Chancellor, naturally higher qualities than mere care, patience or acuteness are expected. He was the delight of painstaking equity pleaders who had the satisfaction that every argument of theirs was taken note of and dealt with in the judgment. The worst that can be said of him is that he burdened the books with many long and obscure judgments but he was always credited with purity of motive and conscientious industry. Another Vice-Chancellor who came in just at the end of this

period, *i. e.*, in 1865, was Malins V. C. Weakness in law is not an uncommon feature with Judges, but the peculiarity of Malins was that he revelled in it. He was a good man but made a bad Judge. So strong was his love of fair dealing and hatred of oppression that he did not look very closely to the means by which he came to decide in favour of those who aroused his sympathies. If he failed in finding out a way to bring about the result he desired, he would try to make the parties compromise ; if those efforts failed, he would disallow the successful party his costs or some time even make him pay the costs of the unsuccessful party. Costs being within his discretion he felt sure that no appeal lay, but even there he was mistaken and once the Appellate Court interfered. There were appeals from almost every decision of his and his decisions were generally reversed. Even if the decision was right his reasons were wrong. It was a time when suitors could choose their own Courts and all hard cases without law on their side found their way into his Courts where they expected sympathy and success.

Ecclesiastical Reports.—The jurisdiction of the Ecclesiastical Courts in civil causes extended ordinarily to causes of matrimony and divorce, testamentary causes and the incidents thereto such as the probate of wills and grants of administration, controversies touching tithes, presentation to benefices, church rates, etc. Their criminal jurisdiction extended among other things to defamation. This jurisdiction was taken away in 1855. In 1857 their jurisdiction in testamentary matters was transferred to the Court of Probate and their matrimonial jurisdiction to the Divorce Court. The reports of the Ecclesiastical Courts till that date are of importance on all questions touching wills, divorce, defamation, etc. The highest Court of Appeal in ecclesiastical matters till 1833 was the Court of Delegates so called because the Judges in it sat by virtue of the King's Commission under the Great Seal. It was superseded in 1830 by the present system of appealing to the King in Council. The Primary Courts of importance dealing with these subjects were the Consistory Courts, *i. e.*, the Courts of the Bishops and Archbishops. The Judges of those Courts used to be called Chancellors. Of these Courts the Consistory Court of London came into special prominence. It was the only Court which used to entertain matrimonial and divorce suits from all parts of England. Prior to the reign of Henry VIII a party might cite the opposite party wherever resident to appear in the Court of his own

diocese. In 1531 a statute prohibited such citation. But the Courts held that this did not prevent parties from proceeding in such Courts by consent. This view led to parties proceeding to the London Consistory Court not only for the advantage of having their cases tried before an experienced Judge but also to enable them to have their cases conducted by London Proctors and members of the Doctors' Common Bar. Till 1867 it used to be thought that only members of this bar could practise before those Courts. At any rate, knowledge of civil law and canon law was a necessary equipment for practice in those Courts and could be found only in the "Doctors of the Common Bar". These advocates had practice also in the Admiralty Courts which were presided over by one chosen from among them. The Ecclesiastical Reports start with Haggard's Consistory Reports from 1789 to 1821 and Phillimore's Reports from 1809 to 1821. Phillimore was the father of Sir Robert Phillimore, the Admiralty Judge, later on Justice Phillimore. Addams reports from 1822 to 1826, Haggard from 1827 to 1833, Curteis from 1834 to 1844 and Robertson from 1844 to 1851.

Admiralty Reports date from 1776. Marriott deals with cases from 1776 to 1779 and Robinson from 1799 to 1808, *i. e.*, the period of Lord Stowell who is the most famous of the Admiralty Judges. Other well-known names are Lushington who sat in the Privy Council and delivered some of the judgments in the Moore's Indian Appeals and Sir Robert Phillimore. Edwards reports from 1808 to 1810, Dodson from 1811 to 1822, Haggard from 1822 to 1827, Dr. Robinson from 1831 to 1852, Swabey from 1858 to 1859, Lushington from 1860 to 1863 and Browning and Lushington from 1864 to 1865.

There are certain reports which report both Ecclesiastical and Admiralty cases, like Notes of Cases in the Ecclesiastical and Maritime Courts (1841-1850), Spinks (1853-1855) and Dean and Swabey (1855-1857).

The decisions of Probate Court established in 1857 are reported in Swabey and Tristram (1858-1865) and Searle and Smith (1859-1860); the decisions under the various Bankruptcy Acts by the Courts created under them will be found reported in the series, Rose (1810-1816), Buck (1816-1820), Glyn and Jameson (1821-1828), Montagu and M'Arthur (1828-1829), Montagu (1830-1832), Montagu and Bligh (1832-1833), Deacon and Chitty (1832-1835), Montagu and Aryton (1833-1838), Deacon (1836-1839), Montagu and

Chitty (1838-1840), Montagu, Deacon and De Gex (1840-1844), De Gex (1845-1850), Fonblanque (1849-1852), De Gex, Macnaghten and Gordon (1851-1855), Bankruptcy and Insolvency Reports (1853-1855), De Gex and Jones (1857-1859), De Gex, Fisher and Jones (1859-1861) and De Gex, Jones and Smith (1862-1865). The identity of the reporters of Insolvency and Chancery is accounted for by the appellate jurisdiction of the Chancellor and the Lords Justices under the Insolvency Acts. Another series is Cresswell (1827-1829) and Macrae and Hertslet (1847-1852).

The reports that we have been hitherto dealing with are regarded as more or less authorised. The idea of authorised reports arose from the Licensing Act of 1662 which required for law books the leave of the Lord Chancellor and one of the Chiefs of Common Law. Even after the lapsing of the Licensing Act, the practice of taking certificate from one or more Judges continued. The *imprimatur* of course gave no guarantee as to the authenticity. But whatever the case with the earlier reports, the reports after George III's time seem to be, as we have had occasion to remark, carefully prepared. The fact that they were authorised gave them a monopoly which made for both prolixity and dilatoriness so that from 1823 onwards a number of anonymous reports appeared some of which continue up-to-date. The first of the series, the Law Journal Reports, made its appearance in 1823 and continues till to-day, the new series, as they are called, beginning from 1832. The Jurist began half-magazine and half-gazette in 1837; from 1841 it confined itself to reports and finally ceased to exist in 1866. In 1837 appeared Justice of the Peace reviewing magisterial decisions. In 1845 the Law Times appeared at first with reports and general matter mixed but from the commencement of the new series in 1859, in separate volumes. Weekly Reporter first appeared in 1852 with a view of giving brief and speedy notes of current decisions and was finally incorporated with the Solicitors' Journal and Reports in 1857. In 1884 commenced Times Law Reports which are published weekly during the sittings of Courts and give an account of the current legal business. It was thought that the publication of the Law Reports would put an end to these reports, but it has not had the effect contemplated for the obvious reason, firstly, that no journal could meet the needs of all classes of practitioners which the increasing complexities of modern life tend to divide into compartments of specialised learning; secondly, consideration of space

would naturally lead to a certain amount of holding over of cases which gives to the competitor his opportunity.

Another set of reports to which reference should be made is the Railway and Canal Cases. These report decisions of the Canal Commissioners or of Committees of Parliament from whom an appeal lay to the Court of Common Pleas and later on to the Court of Appeal. When these cases were cited before the Court of Common Pleas in 7 Manning and Granger 4, Chief Justice Tindal told counsel that so far as the reasoning went it might be proper to cite them but not as authorities. Those reports are Railway cases (1835-1855), Beavan and Walford's Parliamentary Cases (1846), Neville and Macnamara (1855-1905).

The next reports to which we shall refer are the Election Reports. Under the Parliamentary Election Act, 1868, the trial of Parliamentary elections is conducted before two Judges of the King's Bench Division selected from *rota* appointed annually. Before that, Judges were not employed for the purpose. These series begin from 1776—Fraser (1776-1777), Phillips (1782), Luders (1785-1790), Peckwell (1802-1806), Corbett and Daniell (1819), Cockburn and Rowe (1833), Perry and Knapp (1833), Knapp and Ombler (1834), Falconer and Fitz Herbert (1837), Baron and Austin (1842), Baron and Arnold (1843-1846), Power, Rodwell and Dew (1847-1856), Wolferstan and Dew (1856-1858), Wolferstan and Bristowe (1859-1865), O'Malley and Hardcastle, 1869 onwards.

The only reports that remain to be dealt with are the reports of the House of Lords. It is a remarkable feature in the history of English Law that the early authoritative source of the law is not the reports of the judgments of the House of Lords, admittedly the highest judicial authority, but the reports of the less august tribunals, the Chancery and Common Law Courts. The reason is not far to seek. Till we come to recent times, the legal profession was but poorly represented in the House of Lords. So often, the Lord Chancellor was the only Law Lord. Sometimes even he was not a lawyer. During the long period Lord Hardwicke was the Lord Chancellor, he was the only Law Lord. Later he had Lord Mansfield with him. In these circumstances, it is not surprising that the Court of Session in Scotland should have resented the reversal of a decision of a full Court of fifteen Judges by Lord Eldon assisted

by one other Law Lord and should have gone so far as to say that the decision of the House of Lords will be obeyed but not followed. It is only when by the retirement at small intervals of Lord Chancellors a number of Law Lords became available, that the prestige of the House of Lords increased and it became a really effective body. The poverty of legal element in the House of Lords was occasionally sought to be made up by summoning the Judges to the bar of the House of Lords to give their opinion on the questions submitted. As this practice caused considerable dislocation of business, it could only be rarely resorted to. The reports of the House of Lords commence with Brown (1702-1800) in eight volumes. This report was published in 1803. The period covered is a sufficient index to the importance attached to the House of Lords' decisions of the period. Dow (1812-1818) and Bligh (1819-1821) cover Lord Eldon's time. Dow and Clark (1827-1832) contain judgments of Lords Eldon and Lyndhurst. In fact, with only Clark and Finnelly we get to reports often referred to as authority. Clark's House of Lords Cases also have decided many questions of importance. During the period of the last-named reports you had many retired Chancellors available, Lord Lyndhurst, Lord Cottenham, Lord Cramworth, Lord St. Leonards, Lord Erskine, Lord Chelmsford and others so that the House of Lords could stand on its own legs. The other reports of this period are Maclean and Robinson (1839) and West (1839-1841).

The reports of the Privy Council begin from 1809— Acton from 1809 to 1911 and Knapp from 1829 to 1836. But the regular reports only begin from 1833 when the Judicial Committee was organised. Before that a special Committee had to be appointed for each case and the cases heard also were not many. Moore (1836-1862), Moore's N. S. (1862-1873) and Moore's Indian Appeals (1836-1868) make up the series. The lawyers that compose the Judicial Committee are practically the lawyers that decide cases in the House of Lords with a leaven of Judges that are not peers It is only recently that Colonial Judges have been added on but their number is too small to produce any impression upon the judgment of the tribunal except in cases where local knowledge might be considered essential.

SUMMARY OF ENGLISH CASES.

VERGOTTIS *v.* WILLIAM CORY AND SON, LTD., (1926) 2 K. B. 344.

Shipping—Charterparty—Obligations of shipper—Failure to have cargo ready—Breach of—Liability to pay damages.

A shipper's obligations with regard to the loading of the cargo are twofold: (1) an absolute obligation to provide the cargo at the port of loading, and (2) an obligation to do his part of the loading in the agreed time, *i. e.*, the fixed lay days, or a reasonable time, as the case may be. This does not mean he must always have the whole of the cargo at the port when the ship arrives. He must have made and carried out arrangements for the delivery of the cargo at the ship's side in time to load her in accordance with the terms of the charterparty. But this obligation arises only after the vessel arrives in the dock.

PUBLIC TRUSTEE *v.* ELDER, (1926) 1 Ch. 776.

Partnership—Suit for accounts—Parties to suit—Custodian of Enemy Property—Position of—Partnership Act, 1890, *Ss.* 31, 38.

Three German subjects were in 1914 carrying on business in England in partnership with an Englishman, who was the managing partner. During the period of the war, he collected the assets with a view to dissolution. In 1924, the property of the German partners became vested in the Public Trustee, as custodian for enemy property and he sued the executor of the English partner for accounts. *Held,* by the Court of Appeal affirming the decision of Eve, J. in (1926) Ch. 266 that all the partners should *eo nomine* be parties to the suit, and the German partners not having been impleaded the suit was not maintainable.

Per Sargant, L. J.—An assignee of the share of a partner in a dissolved partnership cannot, when requiring an account as from the date of dissolution, substitute for the reciprocal personal obligation of the assigning partner to account to the other partners a mere personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations.

In re PARK WARD AND COMPANY, LTD., (1926) 1 Ch. 828.

Company—Winding up—Debentures issued pending proceedings—Validity of—Companies (Consolidation) Act, 1908, *S.* 205 (2).

After a petition had been put in for the winding up of a Company, and prior to the order of winding up, a person advanced a sum of money to the Company for paying the wages to its staff and a debenture was created in his favour. The debenture-holder knew at that time of the petition for winding up. *Held*, the debenture was nevertheless valid. L. R. 3 Ch. 443 followed.

In re WILKINSON : PAGE *v.* PUBLIC TRUSTEE, (1926) 1 Ch. 842.

Will—Construction—Legacy to niece until she voluntarily ceased to reside in a house—Marriage of legatee and change of matrimonial home—Effect of.

The testatrix gave by her will a dwelling house to her niece and directed the trustees to pay to her the income arising from some funds to be paid to her " during the term of her natural life or until she shall voluntarily cease to make the said dwelling house her permanent home " and in that event, the fund was to form part of the residuary estate. The niece married and pursuant to her husband's wishes, she wanted to change her matrimonial home. *Held*, on a construction of the will, the bequest was one for life and the clause relating to the dwelling house was not a condition subsequent but merely in the form of a limitation; the bequest was not invalid as being uncertain or contrary to public policy ; and as the change of residence was only in pursuance of her marital duty, it could not be said to be " voluntarily ceasing " within the meaning of the clause in the will so as to deprive her of the interest under the will.

R. E. JONES, LTD. *v.* WARING AND GILLOW, LTD., (1926) A. C. 670.

Bill of change—Holder in due course—Payee of cheque, if one—Money paid under mistake of fact—Fraud—Suit for recovery of—Bills of Exchange Act, 1882, *Ss.* 2, 21, 29 *and* 31.

X fraudulently represented to the plaintiffs that he was the agent of a Motor Company, which was being backed up financially by the defendants, and offered them the sole agency of the motor-car, and on that basis wanted from them an initial deposit of £5,000. A cheque was duly issued in the name of the defendants, and sent to them. The defendants did not know of these representations, but accepted the cheque as paid on behalf of *X*, who owed them a large sum of money.

The plaintiffs came to know soon after that the whole affair was a sham, that no Motor Company existed as alleged by *X* and thereupon sued the defendants for return of the money, as paid under a mistake of fact. *Held,* by a majority of the House of Lords (Viscount Cave, L. C. and Lord Atkinson dissenting), reversing the decision of the Court of Appeal in (1925) 2 K. B. 612, the plaintiffs were entitled to recover the money.

Per curiam.—The original payee of a cheque is not a holder in due course within the meaning of the Bills of Exchange Act, 1882.

LETANG *v.* OTTAWA ELECTRIC RAILWAY COMPANY, (1926) A. C. 725.

*Torts—Negligence—*Volenti non fit injuria*—Applicability of—Invitee—Dangerous premises—Duty to.*

In the case of a person who has been invited to the premises of the defendant on business and who sustains personal injuries owing to the dangerous condition of the premises, the maxim *volenti non fit injuria* will apply as a defence to an action for damages only if it is proved that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

BANK OF N. T. BUTTERFIELD AND SON, LTD. *v.* GOLINSKY, (1926) A. C. 733.

Company—Shares in Bank—Equitable assignment—Title of holder—Priority.

Where there has been a transfer in equity of the shares in a Bank, even although there has been no registration of the legal title, the equitable assignee is entitled to say that any advance to or purchase from his assignor does not cut down his title. Such equitable title cannot be defeated by a legal estate of which he had no notice.

FIRM OF R. M. K. R. M. *v.* FIRM OF M. R. M. V. L., (1926) A. C. 761.

Principal and agent—Money-lending firm with vilasam—*Judgment against agent with* vilasam—*If bars suit against firm*—Res judicata.

A *Nattukottai Chetty* firm was carrying on money-lending business in Penang under the firm *vilasam* and it was being managed by an agent. All legal proceedings and transactions by or against the firm were done in the name of the firm *vilasam* to which the name of the agent would be appended. A cre-

ditor of the money-lending business obtained judgment against the firm as described above, and subsequently sued the firm alone for the same debt. *Held,* such a suit was barred. The principle on which *Kendall* v. *Hamilton,* 4 A. C. 504 is based, explained.

CHRISTIAN *v.* TAYLOR, (1926) A. C. 773.

Will—Construction—Estate to widow for life—Remainder to children—Gift over to survivors on death without issue —Period of distribution.

A person by his will gave the residue of his estate to his widow for life and specific lands for each of his children, which however were to take effect only after her death. There was finally a clause which recited that if any of his children died without issue, his or her share should be divided among the survivors. *Held,* the reference to children dying without issue could mean only death prior to the period of distribution, *i. e.,* the death of the widow. Case-law discussed.

GORDON GRANT AND CO., LTD. *v.* F. L. BOOS, (1926) A. C. 781.

Mortgage—Decree for sale—Mortgagee purchasing property with leave of Court—Personal covenant—Right to sue for balance.

Where after a decree for sale on a mortgage, the mortgagee with the leave of Court purchases the property at the sale, he can afterwards sue on the personal covenant for any balance that may remain due. In such a suit the mortgagor cannot claim that his right to redeem had been revived and reopened. Rights of parties set out.

WRIGHT *v.* MORGAN, (1926) A. C. 788.

Trust—Trustee if can buy property belonging to—Option to trustee to purchase given in will—Assignment of option—Validity.

A testator by his will provided that a certain property should be offered at a proper valuation to his son *X,* who was one of the trustees appointed under the will. *X* conveyed his rights under the will to *Y,* another son of the testator and also a trustee under the will. *Y* exercised the option and purchased the property under a proper valuation. *Held,* the purchase by *Y* was invalid, as there was a conflict between interest and duty and equity would not allow such a transaction to stand.

In re GRIFFITHS: JONES *v.* JENKINS, 95 L. J. Ch. 429.

Will—Construction—Income of fund to a person—Provision against disposal—Bankruptcy petition—Effect of.

Under the terms of a will, the trustees were to pay the income of a fund to *X*, but he was not allowed " to anticipate, charge, assign or otherwise dispose of " the same, and if it was so done, the fund was to be divided among other beneficiaries. During the lifetime of the testator *X* was adjudged insolvent on his own petition. *Held,* it did not bring the defeasance clause into operation and the interest of *X* passed to his trustee in bankruptcy.

WILSON *v.* SIMPSON, 95 L. J. K. B. 885.

Income-tax—Insurance premia—Deduction of—Policy on joint lives—Allowance of proportionate share—Income-tax Act, 1918, *S.* 32 (1) (*a*).

Where an insurance is effected in respect of the joint lives of two persons and each of them is to pay half the premium amount, no deduction will be allowed in respect of the half share of the premium paid.

JOTTINGS AND CUTTINGS.

Sir Henry Dickens, K. C.—The celebration of their golden wedding by Sir Henry and Lady Dickens has recalled to public attention the close and intimate connection which always has existed between Law and Literature. Sir Henry is not only Common Sergeant of the City of London, and in that capacity a distinguished criminal judge ; but also one of the many able jury advocates who a generation ago, in the great days of Sir Edward Clarke and Sir Edward Carson, were only second to these great masters in the art of captivating by moving eloquence " twelve good men and true ". He has also, however, what many will regard as the even greater distinction of being the son of the most popular of all English novelists, Charles Dickens, himself at the beginning of his life a solicitor's clerk, and the greatest master in fiction of the art of portraying lawyers and legal scenes under the guise of Romance. The Common Sergeant, too, is named after another great novelist who was also a lawyer, Henry Fielding, for many years a London police-magistrate. There was once a Mendelssohn who used to complain that in his youth he

was known as the son of Mendelssohn the great composer, and in his age as the father of Mendelssohn the great philosopher, but no one ever called him what he really was, Mendelssohn the lawyer and Burgomaster. Sir Henry, however, will be remembered both as Common Sergeant in his own right, and as the talented son of a famous father.

—*The Law Journal*, October 2, 1926, p. 207.

The Honour of the Profession.—In his interesting paper on "The Honour of the Profession and Our Society as its Guardian," which was read at the Birmingham Meeting, Mr. R. Ralph Tredgold suggested that its honour might be safeguarded pecuniarily by the Law Society undertaking to indemnify the public against loss incurred by the fraud of a member of the Society. This is a variation on the proposals which have been made with the like object in recent years. There was the attempt made by Mr. William Godden in a paper read at the Weymouth Meeting in 1900 to extend the system of keeping separate accounts for clients' money and the solicitor's own money. The plan, he said, had been in operation in many leading businesses for many years, and the solicitors who used it testified to the comfort and assurance it gave. Probably since then the practice has very much increased. Next, there came the attempt, to which Mr. Tredgold refers, to submit solicitors' accounts to an annual audit. This was one of a series of recommendations made by the Solicitors' Practice Committee in June, 1907, and considered by a general meeting in the following month. It was rejected on a poll by a very large majority—4,635 to 691, though other recommendations, including the keeping of separate accounts, were adopted. The weak point was, that no means were provided for making the practice obligatory. Mr. J.S. Beale referred to this omission in his Presidential address at the Birmingham Meeting in the following year, and suggested that a pledge to adopt it should be made a condition of membership of the Law Society and the Provincial Societies, but no step in this direction has, so far as we are aware, ever been taken.

—*The Law Journal*, October 2, 1926, p. 208.

The Status of the Profession.—In his paper on "Some Matters Affecting the Status of the Profession," Dr. E. Leslie Burgin was on ground similar to that occupied by Mr. Tredgold in the paper referred to above, though his observations were rather in the abstract than concrete, and perhaps tended

in some respects to be idealistic rather than practical. The reply to the question, "What is the daily object of the members of our profession?" would, according to the realist, be—costs. Dr. Burgin omits this homely detail, and suggests that it is the accurate determination of the law upon a given subject; and, beyond this, the solicitor must remember that he is dealing with living exhibits and sentient beings. He is not to forget this when he writes a letter claiming payment of a debt. It may mean "the bringing of a great cloud over the inmates of the house," and may even spell ruin. That is so, and the writing of the letter is a regrettable necessity, but it has to be done. We gather that Dr. Burgin will be satisfied if the letter has more humanity in its terms than is often the case. We doubt if it would make much difference either to the debtor or to the status of the profession. A solicitor's letter, however it is framed, is the mildest of the processes known to the law. Still, no doubt the status of the profession depends upon the conduct of its individual members, and it is because this has been realized, and the individual members as a whole have steadily advanced in education, ability and disinterestedness, that the profession now holds so high a place in the Commonwealth.

—*The Law Journal*, October 2, 1926, p. 208.

The Writing of Judgments.—The art of writing judgments is no mean one; and some remarks on the subject in the recently-issued book by Mr. Henry W. Taft ("Law Reform"; New York. The Macmillan Co.) are very much to the point. True, Mr. Taft is referring in particular to judicial shortcomings in America; and, indeed, he declares: In the decisions of English Judges the art of condensation is highly cultivated. "For quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of English Judges are a mine of instruction and treasury of joy:" a generous tribute enough. But that the art of the written judgment has attained, this side the Atlantic, anything approaching perfection, no one with a detailed knowledge of the *Law Reports* would dare to affirm; and the "ideal Judge" whom Mr. Taft pictures in this connection is still below the horizon. "The ideal judge," he says, "confines himself to a brief, clear-cut analysis and a logical conclusion. He has the power of lucid statement; a sense of literary style; sufficient industry to revise and then again revise; some facility in the art of condensation; and he avoids lengthy and irrelevant dissertations without definite purpose, representing merely his individual

views." Mr. Taft, indeed, is very shy of the *dicta* habit. "It is," he says, "only the quaint artificers that may set at naught the sound rule that *dicta* are to be avoided." He deprecates, too, "useless dissenting judgments". His main argument against them is that they have not the force of precedents. "Inevitably, therefore, they are written without the responsibility that should actuate and restrain judicial action." On the other hand, he agrees that a Judge who is "capable of profound analysis and luminous reasoning, and is gifted in the art of persuasive expression," may, in a dissenting judgment, "promote discussion of a needed change, and thus perform a valuable service, albeit under our system of precedents it is not a part of the judicial function."

—*The Law Journal,* October 9, 1926, p. 231.

Mr. Taft and Judicial Humour.—The outstanding feature of Mr. Taft's book is the brilliant introductory essay; and some incidental comments of his on the proneness of English, no less than American, Judges to "ignore Bacon's admonitions that they should be more learned than wittie," and that "an over-speaking Judge is no well-tuned cymbal," will be read with interest by lawyers this side of the Atlantic. The English Bar, says Mr. Taft, is "a small highly-organised body of men, generally of broad culture, professional and otherwise," whose reputation and livelihood depend upon their compliance not only with the requirements of the law but also with the more subtle exactions of professional proprieties. "They are more directly responsible to the Court, and are, at least in theory, more subject to judicial restraint, than are the vastly greater number of American lawyers who may go into any Court without the patent of professional nobility which distinguishes the English barrister." In spite, however, of a highly-trained bar, in spite, too, of the fact that the Judges themselves are selected from the bar; in spite of this, declares Mr. Taft, the highest standards of judicial decorum are not always observed by the English Bench. "I have before me records in four recent trials in England, selected at random, in which the Judges repeatedly indulged in quite gratuitous witticisms which evoked unchecked laughter. A little humour creating a general atmosphere during a trial, aids the Judge, counsel and jury in the investigation of truth; and it produces in witnesses a self-possession which aids them in testifying. But too frequent indulgence in pleasantries is hardly consonant with proper decorum, and especially since it is a very poor

judicial sally to which the gravest court-room audience will not obligingly re-act."

—*The Law Journal,* October 9, 1926, p. 231.

Sir Thomas Rolls Warrington.—The opening of a new Legal Year is often marked, as is this one, by two features, one of gladness and one of sadness; the appointment or promotion of new figures in the judicial hierarchy and the retirement of old ones. There will be general regret at the resignation of Sir Thomas Rolls Warrington, who has been a Judge for two and twenty years, a King's Counsel for about forty, and a member of the Chancery Bar for fifty-one. A Rugby schoolboy and a scholar of Trinity College, Cambridge, Lord Justice Warrington was one of those members of the Bar who rise rapidly into practice and achieve an early success. It was his combination of two qualities not always found together which marked out Sir Thomas for rapid success: he united a strong, even a masterful, personality with a singularly sound and thorough comprehension of legal principles. As a first instance judge in Equity, he shared with Lord Cozens Hardy and Lord Swinfen Eady, afterwards both holders of the office of Master of the Rolls, the distinction of being a judge hardly ever reversed in the Court of Appeal, and, if reversed in a moment of temerity, almost certain to have his judgment restored in the House of Lords. His promotion to the Court of Appeal was a simple matter of course, and there for many years he has been the mainstay in matters of Equity of a Court in which Common Law Judges now predominate in the ratio of two to one. Two years ago the catastrophe of a broken thigh deprived the Court of his services for several months, but with unbroken courage he returned to work on his recovery. We may express the hope that in the well-deserved peerage which he receives, a well-known name will not be dropped.

—*The Law Journal,* October 16, 1926, p. 245.

The New Chancery Judge.—The selection of Mr. Albert Charles Clauson, K.C., for the vacant Chancery Judgeship had been pretty generally anticipated for some time, and is warmly welcomed. Mr. Clauson has long enjoyed great popularity among all who know him, whilst his abilities have always caused him to be regarded with the greatest respect. Age does not handicap him, since he is only fifty-six, a somewhat youthful age for a Chancery Judge. A double first at Oxford and a Tancred Scholar of Lincoln's Inn, he was called to the Bar in 1891, took silk in 1910, and became a Bencher in

1914. It was in company law and practice that he reached the pinnacle of success he now enjoys; there is no Chancery practitioner—except, perhaps, the veteran Mr. Upjohn—whose professional income has reached his of recent years, unless all rumours are false. But his great gifts of rapid and accurate grasp of principles, and lucid exposition of complicated facts, are not confined to company matters; he has shone in every sphere of Chancery practice. His gift for advising laymen in consultations led to his appointment as standing counsel to a large number of public and private bodies, of which Oxford University and the Royal College of Physicians are two. As a text-book writer, his edition of *Buckley* has maintained the standard of those edited by the author.

—*The Law Journal,* October 16, 1926, p. 246.

The Late Sir John Strachey Bucknill.—Members of the Bar who have experience of the Colonial Service learned with deep regret last week of Sir John Bucknill's untimely death. Born in 1873, and called to the Bar at the Inner Temple in 1896, he served as an Imperial Yeoman in the South African War, and thereafter elected for a career in the wide spaces of the Empire, although family influence might have won for so talented an advocate first-rate opportunities in England. He held minor judicial offices in the Transvaal, and afterwards in Cyprus and Hong-Kong. Then, in 1914, he became Chief Justice of the Straits Settlements, where it was generally agreed at the Bar that he displayed a legal learning hitherto unknown amongst colonial Judges. In 1920 he was transferred to the Indian Office as a Judge of the High Court at Patna, and there, too, his reputation for learning and scholarship was of the highest order. It was generally understood that on his retirement, due in a few years, the precedent in the case of Lord Hobhouse and Sir John Edge would be followed, and he would be added to the list of Privy Councillors for service on the Judicial Committee. A naturalist, an archæologist and a numismatologist, as well as a lawyer, he was one of the most versatile, as well as one of the most humane of men. Ever genial and ever debonnaire, he will be sincerely mourned by all who practised in his Court.

—*The Law Journal,* October 16, 1926, p. 247.

The Parental Rights over Children: Tremain's Case.—The recent American case of *State of Washington* v. *Russel Tremain,* in which the American Courts have taken away from both his parents the custody of a boy on the ground that they

had forbidden him to salute the Star and Stripes at school, thereby proving themselves to be unpatriotic and ethically unfit to enjoy the *privilegium* of *Patria Protectas,* will have reminded some practitioners of the coincidence that it was in the case of a youth called, also, "Tremain" that Lord Eldon stretched to the extreme the authority of the Court of Chancery over a ward of Court. In *Tremain's Case,* 1 *Stra.* 168, the guardian of a youth under age decided to send him to Cambridge, whereas the young man insisted on going to Oxford. At Common Law, in such a case, the infant being over sixteen, although under twenty-one, his father or guardian would have had no power to compel him to reside where he did not wish. But Tremain's father had made a settlement upon him so that Tremain was a ward of Court, and, therefore, his guardian had on his side the whole machinery of the Chancery Division to maintain his authority over the youth and secure obedience. The Court not only made an order that the youth must attend Cambridge, but sent a messenger to carry him from Oxford. On the boy returning to Oxford, the Court sent another messenger "*tam* to carry him to Cambridge, *quam* to keep him there". This is, of course, the leading case which illustrates the much greater authority over a ward of Court possessed by the Chancellor than the common law authority vested in his guardian.

—*The Law Journal,* October 16, 1926, p. 248.

Judicial Changes in India.—Ever since the Ministry of Lord North remodelled the judicial system of India on the lines of English procedure, sending out Sir Elijah Impey as the first Chief Justice of Bengal, and Mr. Justice Chambers —Dr. Johnson's friend and conveyancer—as one of his puisnes, India has afforded a great career for English Barristers alike in practice and on the Bench. The Indian law vacations correspond closely with the English, and the close of the legal year in India, like that in England, is usually marked by retirements and new appointments amongst the Judiciary. On the present occasion Sir Lancelot Sanderson has retired from the Chief Justiceship which he has held for about fourteen years; and he has been succeeded by Sir George Claus Rankin, one of the Judges of the High Court of Calcutta. This succession had been generally anticipated, since Sir George is not only a very learned and sagacious lawyer, but earned his title to promotion seven years ago by the courageous skill with which, as judicial member of Lord Hunter's Commission which inquired into the Punjab Riots and their

repression, he insisted on probing the massacre of Amritsar to the bottom, refused to let evidence be ignored or atrocities hushed up, and drafted the statesmanlike report which, steering clear between pro-Nativism and Imperialism, summed up with eminent fairness the exact degree of responsibility and the exact amount of excuse which might reasonably be pleaded in respect of each of the chief actors of that tragic drama. Sir George Rankin was a very distinguished student, first of Edinburgh University, and afterwards of Cambridge, where he was president of the Union, as well as a first-class in Moral and Political Science. At the English Bar he entered the chambers of Lord Sterndale, and enjoyed a large junior bankruptcy practice until the war called him to service as an Artillery Officer. Shortly before demobilisation he was offered and accepted an Indian Judgeship at the instance of Sir Lancelot Sanderson, then Chief Justice, who had known and greatly admired Rankin's form at the English Bar. He is certainly one of the most intellectual and scholarly Judges who ever have served in India, and nothwithstanding nearly nine years of judicial service, is still on the right side of fifty.

—*The Law Journal*, October 23, 1926, p. 261

The Retirement of Sir Lancelot Sanderson, K. C.—The retirement of Sir Lancelot Sanderson will be generally regretted in India. Sir Lancelot is a young man for a retiring Chief Justice of fourteen years' standing; for he is only a little over sixty, but age in India is not the same thing as age in England, and no white man who values his health or his reputation for efficiency cares to remain in India after he has entered his seventh decade. Sir Lancelot at the English Bar was in chambers for many years with the late Lord Sterndale, and had enjoyed a very large practice as a junior, both in the Commercial Court and on the Northern Circuit. It was a matter of surprise at the time that one who seemed to have so fair a future before him in England should have been tempted by the offer even of one of the highest judicial appointments in India; but after taking silk Sir Lancelot had suffered a considerable diminution in practice, probably only temporary, and felt that in the circumstances it was his duty not to reject the great prize rather unexpectedly offered him. His appointment is understood to have been due to an instruction contained in a minute of Lord Morley to the effect that on the next vacancy in any high legal appointment in India an effort should be made to secure for the Indian Service some lawyer of first-rate practice and prospects in England. Lord Morley was deep-

ly opposed to the practice, somewhat too common in earlier days, of regarding Indian patronage as a means of rewarding brilliant University men or second-rate politicians who had failed at the Bar. The more modern system, under which only men of standing are selected for the Indian Bench, is the result of Lord Morley's strong views. Certainly in the case of Sir Lancelot Sanderson and Sir George Rankin the principles of that great politician and man of letters have abundantly justified themselves.

—*The Law Journal*, October 23, 1926, p. 262.

Refusal to answer Incriminating Questions.—Every advocate is acquainted with the peculiar rule of the English Law of Evidence which allows a witness to refuse to answer any question if the answer either discloses a defect in his title or the possible commission by himself of a criminal offence. A dramatic illustration of the rule and of the limitations which hedge it around, however, has just been afforded on a grand scale by the American proceedings which have led up to the indictment of Mr. Henry M. Daugherty, formerly Attorney-General of the United States, and of Colonel Miller, formerly Alien Property Custodian in the same country. Certain charges of fraud and conspiracy to defeat the interests of the public were made in Congress last year against private companies and minor officials. A prosecution against certain defendants followed, as the result of which the Grand Jury before finding a true bill, desired to hear the evidence of Mr. Daugherty. He declined to appear voluntarily, but was summoned as a witness by subpoena. He then refused to give evidence on the remarkable ground that his evidence might be used against himself in a criminal charge. The Court, however, took the view that such a plea does not avail to excuse a witness from going into the box and being subjected to questions; it is only available as a plea for refusing some particular question which has been asked after he has entered the box. Mr. Daugherty was, therefore, under the necessity of giving evidence, and of taking separate objection to each question. The result was that he has now been indicted in connection with the matters to which his testimony, thus compelled under a threat to commit him for contempt, related. The case is remarkable not only as illustrating in a very clear way an important limitation on the plea, but also because this is the first recorded case of a prosecution for an indictable offence of any member of an American Cabinet. Of course,

it must not be assumed that Mr. Daugherty is guilty of the complicated offences charged against him merely because he refused to answer questions for the reason mentioned above. Such a plea may be taken by a witness merely *ex abundanti cautela,* and is not to be deemed conclusive of guilt, nor, according to the better opinion of practitioners at the Criminal Bar, is it available to the prosecution as evidence of such.

—*The Law Journal,* October 23, 1926, p. 262.

The Stolen Wig and Gown.—The little misadventure of Captain Ernest Evans, M. P., whose wig and gown were stolen from his car just when he was departing for the Welsh Circuit, has recalled to many denizens of the Temple a somewhat similar episode which happened to Lord Birkenhead, then Mr. F. E. Smith, some twenty years ago. F. E. Smith had just got into Parliament, and was rising into prominence as the daring leader of a new Fourth Party of Tory Democrats, who seemed to have taken the place of Lord Randolph Churchill's once brilliant group. He was staying for a week-end at a country-house in Chester where it so happened that one or two prominent figures in the Liberal Party were also guests, and speculations were rife as to whether or not he was about to "go over" to the Liberal Party. This particular week-end, as luck would have it, a fire broke out and devastated a wing of the mansion, including the room occupied by Mr. F. E. Smith, whose wardrobe was completely destroyed. Next morning he had to appear in Court on the North Western Circuit, but at the commencement of his case he was not forthcoming. His solicitor, however, hastily explained that he had for the moment nothing to wear except a dressing-gown, so that he could not appear, and there had been no time to instruct anyone else in his place. The Bench, after solemnly pretending to consider all the precedents applicable to such cases, finally decided that it had power to adjourn the case *propter necessitatem* until Mr. Smith, "clothed and in his right mind," could appear in wig and gown. It would have been *contra bonos mores,* they held, to insist on counsel appearing in his bath-robe. So the hearing was postponed accordingly.

—*The Law Journal,* October 30, 1926, p. 279.

BOOK REVIEWS.

FICTIONS IN THE DEVELOPMENT OF HINDU LAW TEXTS, by C. Sankararama Sastri, M. A., B. L., Vasanta Press, Adyar.

We must confess we have some doubts as to the appropriateness of the title but that is neither here nor there. We most whole-heartedly welcome this attempt, the first of its kind from Madras to discuss the assumptions, the theories and the atmosphere of mediæval Hindu lawyers. In effect, it is a discussion of the theories and assumptions of the Mimamsa school. Mimamsa being the science of Dharma *par excellence*, the orthodox Hindu lawyers could not help paying allegiance to those theories. Two such theories are the theory of the supremacy and sufficiency of the Vedas as a source of Dharma and the connected theory of Ekavakyata of or harmony among the Smritis. But with all their ingenuity they could not achieve the impossible and so get out of the difficulty by classifying the Smritis according to the age for which they are designed, by the application of the convenient rule that what is not approved of by the world cannot lead to heaven and therefore should not be practised and by the theory of the lost text or as Kumarila Bhatta would have it, the unperceived text. The lecturer has some very interesting observations to make on the question of the relative authority of the Dharma Sastras, usage and King-made laws and on the peculiar doctrine as to Vyvahara as distinguished from Dharma proper which reminds one of the distinction between the Vyavaharika and the Paramarthika in the Vedanta. The whole subject is, of course, capable of a fuller and more systematic treatment which could not be expected in a course of four lectures. It is hoped that either the learned lecturer or some one similarly inclined would develop the thesis and present us with a comprehensive treatise on the subject. The lecturer shows considerable acquaintance with the recondite branch of Sanskrit learning, the Mimamsa, and Mr. K. Balasubramania Aiyar, by whom the lecturership was founded in memory of his father the late Mr. V. Krishnaswami Aiyar, is to be congratulated on the selection of both the subject and the lecturer.

THE PRACTICE AND PROFESSION OF LAW, by Rai Nibaran Chandra Das Gupta Bahadur. Published by Messrs. R. Cambray & Co., Hastings Street, Calcutta.

This is a sort of manual for the guidance of young aspirants in the legal profession and contains much shrewd and

useful advice as is to be expected from a person of the experience of the writer. One bit of curious advice which he gives may be noticed. He says that it is advisable for a practitioner after he has picked up some experience—of course if he does not make a mark in the place of his original choice —to change the place for another where his early failures and blunders will not be known. One other piece of advice which cannot be too much insisted upon is that mother wit alone will never do for success at the bar without industry and application. The book will repay careful perusal.

THE LAW OF MADRAS LOCAL BOARDS, by Mr. C. V. Naidu, Pleader, Trivellore. Second Edition. Printed at the Madras Law Journal Press. Price Rs. 10.

The Madras Local Boards Act and the rules framed by the Local Government thereunder have of late been frequently coming up before the Courts in connection with the disputes about elections;and the publication of the volume under review at this time has therefore to be welcomed by lawyers and laymen alike. So far as we are aware there is no other publication giving the Madras Local Boards Act and all the rules framed under it with full commentaries on the sections and the rules and with a discussion of the case-law under them. In bringing out this work, Mr. C. V. Naidu has done a real service to the cause of Local Self-Government in this Presidency. The author has dealt with the subject in a most exhaustive way by giving explanatory and critical comments under the various sections and rules and referring to all the Indian decisions and the more important English rulings. No decision having any bearing on the Act has been omitted and even cases which have not been fully reported and which have only appeared in summaries of recent cases in the legal periodicals have been referred to. Towards the end of the volume are given the various enactments having any relation to the Local Boards, such as the Madras Elementary Education Act, the Madras Village Panchayat Act, the Indian Election Offences Act, etc. With such a mass of useful information we have no doubt that this work will be found invaluable to lawyers and others having to do with Local Self-Government in this Presidency.

DONOGH'S INDIAN STAMP ACT (Seventh Edition). Edited by Mr. K. J. Rustomji. Published by Messrs. Butterworth & Co. Price Rs. 12.

The late Mr. Donogh's Indian Stamp Law is a well-recognised treatise on the subject and does not need an intro-

duction to the lawyers in this country. It has already passed through six editions which is a singular feature among Indian legal text-books and the present is its seventh edition. Although there is no material change in the law on the subject, stamp duties have been increased practically throughout British India necessitating their being noted under the appropriate articles of the Act. It is a matter for congratulation that the editing of the work has fallen upon such a distinguished legal writer as Mr. Rustomji on the lamented death of the author in January last. Mr. Rustomji has included in this edition the decisions of the superior Courts other than the chartered High Courts, thus enhancing the usefulness of the work. We have therefore every reason to believe that this edition will be found to maintain the high level of usefulness of its predecessors.

THE LAW OF JOINT ACTS, ABETMENT AND CONSPIRACY, by Munindra Nath Ganguli, B. L., Pleader, Judge's Court, Howrah. Eastern Law House, Calcutta.

In recent years, the subject of joint acts, abetment and conspiracy in Criminal Law has assumed great importance and there was a real need for a book which dealt with the subject exhaustively. The author is to be congratulated on the thoroughness with which he has applied himself to the task. The whole case-law on the subject appearing in the various reports of this country is fully discussed and the result stated. We have little hesitation in commending the book to both the lawyer and the student.

GHOSH'S DIARIES, 1927. Published by Messrs. M. C. Sarkar & Sons, Law Booksellers and Publishers, 90|2A, Harrison Road, Calcutta.

Lawyer's Diary and Gem Diary have been sent to us for notice. The former contains much useful information that will interest lawyers, such as tables of Court-fees, stamp duties, the limitation schedule and a digest of recent case-law. The Gem Diary is a small day to a page diary, well suited for general use. The get-up of both diaries is excellent.

[END OF VOLUME LI.]

THE

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NOTES OF INDIAN CASES.

NATHU LAL *v.* RAGHUBIR SINGH, I. L. R. 48 All. 160.

The question in this case was as to whether a decree based on a compromise could be set aside by review on the ground that the compromise was secured by fraud or undue influence. There are numerous cases supporting the view that it could be so done but a complication has been introduced by the decision of the Privy Council in *Chhaju Ram* v. *Neki* (1) which holds that "the other sufficient reason" mentioned in O. 47, R. 1 must be *ejusdem generis* with those specifically mentioned. The question in this case was as to whether the earlier cases could stand in the face of the aforesaid decision. Mr. Justice Boys is of opinion that they could not and that the remedy by way of review was inadmissible in such a case unless the fraud or undue influence was accompanied by the discovery of new or important matter. Mr. Justice Sulaiman agreed in the order but based it on the ground apparently that the person defrauded with full knowledge of the facts affirmed the compromise and as such was precluded from getting it set aside. We are afraid Mr. Justice Boys lays down the rule a little too strictly. Viscount Haldane's language is " excusable failure to bring to the notice of the Court new and important matters or error on the face of the record". If it is only discovery of new matter or evidence that can justify a review, the other portion of the section becomes useless. As Mr. Justice Mukherjee says in *Kumar Gopika Raman Ray* v. *Mahar Ali* (2), the discretion of the Court in saying what is sufficient reason within the mean-

1. (1922) I L R 3 Lah. 127 : 43 M L J 532 (P C).
2. (1923) 39 C L J 247.

ing of O. 47, R. 1 is not so rigidly circumscribed that analogy must in every case be discovered between the two grounds. Tested by the language of Lord Haldane, fraud of which a party is not aware, or undue influence which a party is unable to shake himself from, coercion which precluded a man from representing to the Court the true state of affairs, negligence of the guardian which led to a wrong decision or to a bad compromise or for the matter of that an excusable failure to appear would all be cases of excusable failure to bring a matter to the notice of the Court. It is certainly not clear on the section that wrong decision on the *merits* alone can be corrected by this process and not also irregular procedure. [Cf. *Alamelu Ammal* v. *Rama Aiyar* (3) where signing a compromise in ignorance of its contents owing to the fraud of an agent was held such new matter]. If fraud that has been already discovered, undue influence from which party has shaken himself away or coercion that has ceased to operate, is not brought to the notice of the Court, that circumstance alone might in most cases justify the inference of an election to affirm the transaction.

HARCHAR DAT *v.* MAQSUD ALI, I. L. R. 48 All. 166.

A man was accused before a Magistrate with offences under Ss. 395, 323 and 330. The Magistrate proceeded to inquire into the offences under Chap. XVIII of the Criminal Procedure Code and passed an order of discharge and along with it made an order for compensation. The justification given by the Magistrate was that, of those offences, that under S. 323 was one triable by him. He relied on *Mahaganam Venkatrayar* v. *Kodi Venkatrayar* (4). Mr. Justice Sulaiman based his decision reversing the order on the ground that as a matter of fact the Magistrate proceeded to inquire into the offence as one triable by the Court of Sessions and also discharged the accused in the course of such inquiry. He treated the accusation as one for the bigger offence and proceeded and it was not open to him to proceed as if the accusation was in respect of the smaller offence. The section speaks of *hearing and accusation*. We should think hearing alone cannot be the test as laid down in *Mahaganam Venkatrayar* v. *Kodi Venkatrayar* (4) nor could accusation alone be the test.

3. (1922) 43 M L J 290. 4. (1921) I L R 45 M 29: 41 M L J 398.

The section requires both. Preliminary enquiry is not hearing and therefore the case under review is excluded. The mere fact that accusation of a major offence includes accusation of a minor one cannot justify the Court in awarding compensation. The object of the legislature in enacting S. 250 is to give the Magistrate power to award compensation in the case of petty offences—ostensibly and on the showing of the complainant, petty offences. The mere fact that the complaint is headed under certain sections of the Penal Code cannot conclude the matter. The question is what in fact the offence is —not what the accused thinks of it or the Magistrate thinks of it but what the Penal Code lays down. If the complainant charges the party with the bigger offence, he has not in fact charged him with the smaller also though in law, it might amount to it as well. The section has to do only with what the complainant has in fact done.

BISHESHAR PRASAD PANDE *v.* RAGHUBIR, I. L. R. 48 All. 168.

In this case the First Court returned a plaint for presentation to the proper Court holding it had no jurisdiction and on appeal its order was affirmed. Then a revision was filed in the High Court to revise the First Court's order directing return of the plaint. The Court was exercised over it but felt itself bound by the Full Bench decision in ***Badami Kuar* v. *Dinu Rai*** (1). The same question exercised the Madras High Court in *Atchayya* v. *Atchayya* (2) where the majority decide the question in the same sense, with this difference that the case under review dealt with the matter as a revision against the original order while the Madras Court had to do with a revision petition against the appellate order. The proper view of the matter is that as in cases of prohibition in England, if the Court by an error of law comes to a wrong decision on a question of jurisdiction the High Court must have jurisdiction to interfere.

RAM SARUP *v.* GAYA PRASAD, I. L. R. 48 All. 175.

The question in this case was whether the High Court would revise an appellate order directing the setting aside of an *ex parte* decree. The two points on which there was some conflict in the Allahabad High Court were—whether such a

1. (1886) I L R 8 All 111. 2. (1912) 24 M L J 112.

proceeding was a case; secondly, whether by reason of the fact that the order could be interfered with in second appeal under S. 105, Civil Procedure Code, the order ought not to be interfered with. On the first point, the Full Bench held that it was a case; on the second point that the order was one that did not affect the decision on the merits and therefore could not be attacked in second appeal. The Madras High Court has been taking a different view as to the proper interpretation to be placed on the words "affect the decision". Notwithstanding that, revision petitions have been entertained against such orders [*Venkatrama Aiyar* v. *Nataraja Aiyar* (1), *Neelaveni* v. *Narayana Reddi* (2), *Karuppayee* v. *Chinnammal* (3) and *Gopala Chetti* v. *Subbier* (4)]. The fact is that the existence of other remedies has never been considered an absolute bar to the exercise of jurisdiction under S. 115. However, the uncertainty that exists in this matter gives the revisional jurisdiction something of the dubious reputation of the Chancellor's jurisdiction. The interpretation put by the Allahabad High Court is strained, though it has the support of the Calcutta High Court. The language may be contrasted with that in S. 100 which requires that the defect in procedure should have affected the decision on the merits. Even on the interpretation of the High Court, it is difficult to see why giving opportunity to adduce evidence or refusing the same should not affect the decision on the merits quite as much as admitting inadmissible or irrelevant evidence and should not be a ground for interference.

The question before the Bench was as to whether the Court could set aside the decree on grounds other than those set out in O. 9, R. 13. The Bench following *Neelaveni* v. *Narayana Reddi* (2) and *Sheikh Kallu* v. *Nadir Bakhsh* (5) held that it could not do so.

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1. (1912) 24 M L J 235.
2. (1919) I L R 43 M 94 : 37 M L J 599.
3. (1914) 1 L W 537.
4. (1903) 26 M 604 : 13 M L J 308.
5. (1921) 19 A L J 907

BAI SHANTA *v.* UMRAO AMIR, I. L. R. 50 Bom. 162 (F. B.).

This decision of the Full Bench is important as bringing the Bombay view on the admissibility of the defence of absolute privilege of a witness or party in a judicial proceeding to a prosecution for defamation in this country into line with what is the correct rule and laid down by the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). The Madras and Bombay High Courts had taken the view in *Queen-Empress* v. *Babaji* (2), *Queen-Empress* v. *Balkrishna Vithal* (3) and *In re Venkata Reddy* (4) that the English Common Law rule of absolute privilege was applicable to this country notwithstanding the express terms of S. 499 of the Indian Penal Code which is a consolidating enactment. The fallacy of engrafting an exception from the English Common Law or public policy to the provisions of a consolidating statute was pointed out by Telang, J., himself in *Queen-Empress* v. *Balkrishna Vithal* (3). This vicious rule of construction was set at rest after the demonstration of its absurdity from all points of view by the late Sir Asutosh Mookerjee, A. C. J., in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). Before this decision became familiar, the Madras High Court had even gone the length of holding that the English Common Law rule of a private citizen's right of arresting an offender applied to this country notwithstanding the express provisions of S. 341 of the Indian Penal Code regarding wrongful restraint, *In re Ramaswami Aiyar* (5); and reliance was placed for this rule of construction on *In re Venkata Reddy* (4). Shortly afterwards, however, the question of the admissibility of a defence based on the English Common Law regarding an offence under the Indian Penal Code was referred to the Full Bench in *Gopal Naidu* v. *King-Emperor* (6) and the Full Bench approved of the principle laid down by Sir Asutosh Mookerjee in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1) and held that there can be no defence in this country of a private citizen's right to apprehend on the English Common Law and apart from the provisions of the Indian Penal Code or Criminal Procedure Code. This decision of the Full Bench negatived the principle of the decision in *In re Venkata Reddy* (4)

1. (1920) I L R 48 C 388.
2. (1892) I L R 17 B 127.
3. (1893) I L R 17 B 573.
4. (1912) I L R 36 M 216: 23 M L J 39 (F B).
5. (1921) I L R 44 M 913.
6. (1922) I L R 46 M 605: 44 M L J 655 (F B).

recognising absolute privilege of a party or witness in a judicial proceeding. After the decision of the Bombay High Court under notice, the Madras High Court has expressly overruled *In re Venkata Reddy* (4) in a case which has not yet been fully reported but has appeared in the notes of recent cases in 50 M. L. J. 38. It is thus satisfactory to find that there is now uniformity in the law on the subject in all the Indian High Courts.

SESHGIRI SHAMBHULINGAM *v.* MANJAYYA, I. L. R. 50 Bom. 160.

In this case a suit was brought for the recovery of possession of certain immoveable properties and the High Court decreed the suit and awarded mesne profits only from the date of its decree. The defendants applied for leave to appeal to the Privy Council but the value of the lands alone did not come up to ten thousand rupees and they had therefore to add up the value of the future mesne profits after the High Court's decree to make up that amount and the question arose whether they were entitled to do so. The learned Judges have held that the mesne profits after the High Court's decree should not be taken into consideration under cl. (2) of S. 110 of the Civil Procedure Code according to which it is the amount or value of the property as at the date of the decree of the High Court, that is the determining factor. This question was settled as early as 1860 by the Privy Council in *Gooroopersad Khoond* v. *Juggutchunder* (1) ; and for this purpose there can be no distinction between mesne profits subsequent to the High Court's decree and interest subsequent to that date. If, however, this case were to arise in Madras, although the ultimate decision would have been the same, the reasons for coming to the conclusion would have been different, because the Madras High Court would, on the authority of *Subramania Aiyar* v. *Sellammal* (2), be obliged to hold that a case of this description would fall under cl. (1) of S. 110 of the Code and could not therefore come under cl. (2) and as the value of the subject-matter of the suit in the Court of first instance did not come up to Rs. 10,000 leave ought to be refused. As pointed out by the Madras High Court in that case, giving full effect to the second clause of the section would render nugatory the limitation as to the value of the suit in the Court of first instance

1. (1860) 8 M I A 166.
2. (1915) I L R 39 M 843 : 30 M L J 317.

imposed by the first clause. This necessarily requires a restrictive interpretation to be placed on the second clause. In this connection, we may mention that the Patna High Court in *Maharaja Kesho Prasad Singh* v. *Shiva Saran Lal* (3) was inclined to the opinion that, if the matter were *res integra*, the Madras view would be preferable. Even the learned Judges in *Subramania Aiyar* v. *Sellammal* (2) have not been able to suggest any clear rule which will answer all cases and Mr. Justice K. Srinivasa Aiyangar leaves it open saying that in some cases there may be a difficulty in saying under which clause a particular case falls. As Sir Dawson Miller, C. J., remarked in *Maulvi Imamuddin Khan* v. *Kishundeo Narain Mahatha* (4), it requires a pronouncement of the Privy Council to settle the difference of views between the Madras High Court and the other High Courts. This difference is solely attributable to the Indian Legislature adopting a further requisite of the value of the suit in the first Court being Rs. 10,000 or upwards, a provision absent in most of the colonies for the purpose of the appealability to the Privy Council. Even in the matter of value of the suit in the Court of first instance, it is not clear whether it is as at the date of the plaint or at the date of the first Court's decree, that is contemplated by the section. *Subramania Aiyar* v. *Sellammal* (2) would seem to suggest that it should be as at the date of the plaint while *Raghunathasami Aiyangar* v. *Gopaul Rao* (5) would take it as at the date of the first Court's decree. It should therefore be easier for the legislature to clear up the language of S. 110 and put an end to the conflict of views on the question by bringing it into conformity with what prevails in most colonies.

LAL BAHADUR LAL *v.* KAMLESHAR NATH, I. L. R. 48 All. 183.

In suits to set aside sale of family property, cases where part of the consideration is found not for necessity, fall under four heads :—

(*i*) Where a very considerable part is found to be for necessity and the balance has been paid though no necessity is proved in the sense that that money was wanted for any particular binding purpose.

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2. (1915) I L R 39 M 843 : 30 M L J 317.
3. (1918) 3 P L J 317.
4. (1921) 6 P L J 246.
5. (1922) 43 M L J 622.

(*ii*) Where that balance is found borrowed for a purpose not binding.

(*iii*) Where the balance is not inconsiderable but bears a small proportion to the whole.

(*iv*) Where the balance forms the major portion.

In the first case the sale is upheld either on the ground that the balance may be presumed to have been also properly spent or on the ground that the sale could not be arranged just for the amount required and a few rupees this side and that would not matter and cannot affect the purchaser. [Cf. *Girdharee Lal* v. *Kantoo Lal* (1), *Jainarain* v. *Bhagwan* (2); see also *Thirumalaiappa Mudaliar* v. *Nainar Thevan* (3)].

In the second case, however, small the amount, the amount should be recoverable by the family for the purchaser was a party to the misapplication.

In the fourth case, there could be no question but that the purchaser could only get a charge.

In the third, there are some cases that have upheld the sale giving a charge the question being as to what is a small proportion. It will be found that in *Banwari Lal* v. *Mahesh* (4) on a sale for Rs. 2,000, 1,622 rupees were found binding, and nevertheless the Privy Council set aside the sale giving the alienee a charge. [*See* also *Dwarka Ram* v. *Jhulai Pande* (5), *Jainarain* v. *Bhagwan* (2) and *Sanmukh Pande* v. *Jagarnath Pande* (6)—for the other side see *Krishnan* v. *Govindan* (7)].

Even if the balance is considerable, if amount required could not be raised otherwise, the whole sale might be justified and the family might not be entitled even to a charge. This would occur only in exceptional cases for one of which see *Balakrishnadas* v. *Hiralal* (8) where a house was sold for Rs. 19,000 while the debts amounted only to Rs. 7,000 and yet the sale was upheld.

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1. (1874) L R 1 I A 321 at 332.
2. (1922) I L R 44 A 683.
3. (1922) M W N 804 (P C).
4. (1918) I L R 41 A 63 (P C).
5. (1923) I L R 45 A 429.
6. (1924) I L R 46 A 531.
7. (1921) 41 M L J 381.
8. (1918) I L R 41 A 338.

GORA CHAND HALDAR *v.* PRAFULLA KUMAR ROY, I L R 53 Cal. 166 (F B).

This decision of the Full Bench lays down that it is open to an executing Court to question the jurisdiction of the Court which passed the decree and refuse to execute it if there is a patent want of jurisdiction. We venture to think that this decision will not be received with the amount of consideration that it might otherwise command by the other High Courts, as the learned Judges have not discussed the question of the executing Court's power to question the jurisdiction of the Court which passed the decree on principle and even the leading decisions of the several High Courts were not, if the arguments are correctly reported, brought to the notice of the learned Judges, except the Full Bench decision of the Patna High Court in *Jungli Lall* v. *Laddu Ram Marwari* (1) and an attempt was made mainly to set at rest the conflict of decisions in Calcutta. If the matter has to be dealt with on principle, we venture to submit that the only questions which can properly come within the purview of an executing Court are generally those enumerated in S. 47 of the Code, *i. e.*, those relating to the execution, discharge or satisfaction of the decree and do not extend to questioning the decree on the ground of want of jurisdiction or on any other ground. To put it in other words, as the late Sir Asutosh Mookerjee observed sitting with Cuming, J., in *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) a proceeding to enforce a judgment is collateral to the judgment and therefore no inquiry into its regularity or validity can be permitted in such a proceeding. This of course does not prevent the judgment being questioned in a proper proceeding, such as by way of appeal or revision or by a separate suit or other proceedings. Far from the other High Courts taking a different view from what was laid down in *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) as erroneously stated in the order of reference in this case, they have adopted the same view as may be seen from *Hari Govind* v. *Narsing Rao Konher Rao* (3), so far as the Bombay High Court is concerned, and the Full Bench decision in Madras in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (4) and the cases of *Sami Mudaliar*

1. (1919) 4 P L J 240 (F B). 2. (1916) I L R 44 C 627.
3. (1915) I L R 38 B 194.
4. (1920) I L R 43 M 675: 39 M L J 203 (F B).

v. *Muthiah Chetty* (5) and *Vaithilinga Mudaliar* v. *Chidambaram Pillai* (6) following it. See also *Lahore Bank* v. *Ghulam Jilani* (7) which dissents from *Jungli Lall* v. *Laddu Ram Marwari* (1). The Allahabad High Court has followed *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) in *Raghunandan Prasad* v. *Ghulam Alauddin Beg* (8). In such a state of authority, the decision of the Full Bench under notice is not likely to be accepted by the other High Courts. As for the distinction that an apparent want of jurisdiction can be given effect to by the executing Court, apart from there being no principle in the distinction, it is at best a vague test because no judgment or decree will recite in terms the absence of jurisdiction and still proceed contrary to such recital. The matter will therefore necessarily rest on some amount of investigation of the facts or law or both apart from the decree itself; and it would therefore be difficult to say definitely to what extent such investigation may be legitimately carried and given effect to in execution.

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1. (1919) 4 P L J 240 (F B).
2. (1916) I L R 44 C 627.
5. (1922) 43 M L J 293.
6. (1925) 49 M L J 520.
7. (1923) I L R 5 L 54.
8. (1924) 22 A L J 464.

JAGAN MOHAN SARKAR v. BROJENDRA KUMAR CHAKRABARTI, I. L. R. 53 Cal. 197 (F. B.).

In this case the majority of the Judges of the Full Bench of the Calcutta High Court have held that a suit for the entire rent is maintainable against some of the heirs or legal representative of a deceased tenant alone without bringing on record all his heirs or successors-in-interest. That the questions raised are of considerable difficulty is evident from the fact that out of the five learned Judges who took part in the case two learned Judges have taken the contrary view and there are two conflicting lines of cases in the Calcutta High Court which have been collected together in *Mahendra Nath Bose* v. *Abinas Chandra Bose* (1). It is somewhat remarkable that even in England prior to 1923 it was not settled whether when a tenancy was vested by assignment in a number of tenants-in-common, each one of them was liable for the whole rent or only for a proportionate share of it. Indeed there were dicta of eminent Judges to the effect that in such a case a tenant-in-common was only liable for his share of the rent ; and we find the law stated in the same terms in Halsbury's Laws of England, Vol. XVIII, p. 590, after referring to *Gamon* v. *Vernon* (2). Since then in *United Dairies, Ltd.* v. *Public Trustee* (3) Greer, J. has considered the whole case-law on the question and expressed the view that a tenant-in-common in such circumstances is liable for the whole rent, though the exact point that arose for decision in the case was with reference to a covenant for repairs. In this connection it may perhaps be mentioned that in the case of joint tenants, it has always been understood that each one of them is liable for the entirety of rent ; and when the tenants claiming under the original tenant are entitled to and in possession of distinct parcels in severalty, each one of them is only liable for a proportionate share of rent of the entire holding owing to the privity of estate in respect of their distinct parcels of land. In the case of the heirs of the original tenant who are entitled to distinct but undivided shares therein, they are entitled to the holding as tenants-in-common, as there is no right of survivorship as between them and each can have a distinct share varying from that of the others and these are incidents consistent only with a tenancy-in-common and not a joint tenancy. If so, it is not clear why their liability to the landlord is joint, so as to compel him to sue them all together in one

1. (1921) 27 C W N 521. 2. (1679) 2 Lev 231.
3. (1923) 1 K B 469.

suit. It may be noticed that in the arguments in *Merceron* v. *Dowson* (4), a distinction was made between the liability of tenants-in-common under a lessee for rent and for damages under a covenant for repair, *i. e.,* that in the former case each one of the tenants-in-common may be sued separately and that it is otherwise for neglecting to repair. Again Greer, J.,himself in the case referred to thinks that the liability of the original tenant and his representatives, meaning, apparently thereby, his legal representatives, is on the covenant itself and not by reason of privity of estate. If so, all covenants being in this country joint and several under S. 43 of the Indian Contract Act, a suit is maintainable for the whole rent against each one of the heirs alone without joining the others. We see therefore no reason for introducing the rule of joint liability in the case of the heirs of the original tenant with all the anomalous consequences illustrated in *King* v. *Hoare* (5) and condemned by Lord Penzance in *Kendall* v. *Hamilton* (6).

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4. (1826) 5 B & C 479.

5. (1844) 13 M & W 494. 6. (1879) 4 A C 504.

Brij Raj *v.* Ram Sarup, I. L. R. 48 All 44.

It is well settled that a decree against a minor can be set aside not only on the ground of fraud but also on the ground of gross negligence on the part of the guardian. But as rightly pointed out in this case, it is not every negligence that will have this result. It must be negligence such as if avoided might have led to a different result. Mere fact that the guardian was absent or *ex parte* will not vitiate a decree unless there was an available ground of defence which he could have put forward. There is room for some difference of opinion as to on whom the burden of proof of showing the existence of such a ground or the reverse should lie. Negligence is a question which is to be decided with reference to the materials available to the guardian and it is possible that by the exercise of all the diligence in the world, the guardian is unable to put forward an existing defence. For instance, he may be a Court guardian and it may be the natural guardians or persons in the custody of the child might not put him in possession of the necessary facts in spite of his best efforts in that direction and the case may go for default and yet the decree would bind the minor, cf. *Hanmantappa* v. *Jivu Bai* (1).

Muhammad Shafiq-ullah Khan *v.* Nuh-ullah Khan, I. L. R. 48 All. 58.

The Privy Council has laid down that acknowledgment of sonship by a father in Muhammadan Law raises a presumption of marriage but being a presumption of fact and not *juris et de jure* it is, like every other presumption of fact, capable of being set aside by contrary proof. Until the claimant establishes his acknowledgment, the onus is on him to prove a marriage. Once he establishes an acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. Where therefore there is evidence that the marriage is impossible, invalid or did not or could not have taken place, the presumption cannot avail.

Nageshar Rai *v.* Nand Lal, I L R 48 All. 70.

In this case, a mortgagee planted a mango grove on the land and there was no evidence of consent of the mortgagor to the planting. There was a recital in a later deed of simple mortgage of the

1. (1900) I L R 24 B 547.

existence of these trees but this was held insufficient to prove consent to its planting. What one is unable to understand is why the mortgagee should not have been permitted to cut and carry away the trees which were planted by him. In the case of lessees they are entitled to cut and remove them and it is difficult to see why the same rule should not apply to mortgagees. *"Qui quid plantatur solo cedit"* has never been accepted fully in India. The reason given, viz., that it might cause detriment to the land is hardly satisfactory. It was only a matter of some expenditure and could not be said to be impossible to free the soil of the roots which alone can be deemed to be a possible detriment in a case like this. In this matter the judgment seem to go against the Full Bench judgment in *Raghunandan Rai* v. *Raghunandan Pande* (1). There remains the further question of the mortgagee's right to compensation which is a point on which there is considerable conflict. See *Henderson* v. *Attwood* (2), *Dnyanu Laxuman* v. *Fakira* (3), *Rupan Singh* v. *Champa Lal* (4), *Rahmatullah Beg* v. *Yusuf Ali* (5), *Labhu Ram* v. *Abdulla* (6) and *Arunachella Chetti* v. *Sithayi Ammal* (7). Where accounts have got to be taken, there is not much trouble. We have the authority of the Privy Council in *Kadir Moidin* v. *Nepean* (8) for allowing the cost of such improvements if executed in the reasonable course of management.

TAJAMMUL HUSAIN *v.* BANWARI LAL, I L R 48 A 77.

The High Court in this case found in second appeal reversing the judgment of the Lower Courts that the evidence was sufficient to establish a custom. There has been considerable divergence of view as to the powers of the High Court to interfere in second appeal on a question of custom. A somewhat wide view was taken of the power of the High Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (9) but the Full Bench in *Kumarappa Reddi* v. *Manavala Goundan* (10) took a narrower view holding that the findings of actual facts from which the existence of custom is to be inferred are not open to question by the High Court but that the inference as to the existence and decision as to the validity of the custom are questions of law and open to reconsideration.

1. (1921) I L R 43 A 638 (F B).
2. (1894) A C 150, 163.
3. (1921) I L R 45 B 1301.
4. (1914) I L R 37 A 81.
5. (1912) 10 A L J 124.
6. A I R 1923 L 587.
7. (1896) I L R 19 M 327.
8. (1898) I L R 26 C 1 (P C).
9. (1905) I L R 29 M 24 : 16 M L J 8.
10. (1917) I L R 41 M 374 : 34 M L J 104 (F B).

DARSHAN DAS *v.* BIKRAMAJIT, I. L. R. 48 All. 81.

On the death of one of the respondents in an appeal, is the whole appeal to be taken to abate or is it only to abate in respect of the interest of the particular defendant? Whatever scope for a different opinion there might have been on the old Code, on the wording of the present Code, there could be no question of the whole suit abating—for it is expressly stated now that the abatement shall be only as against the deceased defendant, whereas under the old Code the wording was "the suit shall abate." There may be suits, however, which cannot proceed in the absence of the deceased party and, in such cases, the effect of the abatement might be the dismissal of the appeal. We should think it grossly inaccurate to describe the dismissal of the appeal in such a case as one of abatement though such a language might have been appropriate under the old Code. It would be abatement so far as the deceased party is concerned and dismissal for non-joinder so far as the other parties are concerned. Under the present Code, except in those cases in which the suit cannot at all proceed against the other parties in respect of their interest, there would seem to be no justification for dismissing the whole suit. Where though the suit is one, the interest of each of the defendants or respondents is separate there could be no question and all the Courts are agreed that the suit would not abate. But where the decree is a joint one and the interests are not separate, this case as well as certain Calcutta cases seem to hold that the whole suit must abate as otherwise contradictory judgments will result. See *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (1). There seems to be no justification for the introduction of any general rule like that. Except in cases where O. 41, R. 4 applies and in such a case non-joinder is immaterial the rule above referred to does not obtain at all. Contradictory decrees are so often made in the same suit and that is an inevitable result of the rule of *res judicata* by reason of prior decision in the same suit or another suit. It could not be said that the suit could not go on in the first instance against only some; if it could go on in the first instance, it is inconceivable why it should not equally so on the death of one of the defendants. In the case of mortgage suits the Calcutta High Court has held that the suit can go on in the absence of some of the heirs of the original mortgagor and as against the interest of such as are on the record and for the proportionate share of the money. Why should it make a difference when one of those heirs dies after being once

1. (1919) 24 C W N 44.

made a party ? The Bombay High Court has taken a more consistent view in *Shankerbhai Manorbhai* v. *Motilal Ramdas* (2). There is nothing against a joint decree being passed in favour of the plaintiffs along, if necessary, with the representative not made a party in time. That Court has not felt itself precluded even in a partition suit from making such representative a party for the purpose of giving the plaintiff the relief he seeks, though not against the person so made a party. See *Lakhmichand Rewachand* v. *Kachubai Gulabchand* (3).

LAKHMI CHAND *v.* ANANDI, I. L. R. 48 All 313 : 51 M. L. J. 52 (P C).

In this case, two brothers who were members of an undivided Hindu family executed a document which they styled agreement by way of will by which right was conferred upon the widow of one to remain in enjoyment of his share during her life. While holding that as a will it was not binding; the Privy Council further hold that it might be supported as an arrangement with the consent of all the members then alive of the joint family which they further opine, would be binding even if other members should subsequently be born into the family. They support the arrangement by appealing to the principle that a member of a joint family may alienate his share with the consent of his co-parceners. They express agreement with the view of Wallis, C.J. in *Subbarami Reddi* v. *Ramamma* (4) that a father who is a co-sharer with the minor cannot give such a consent. That was a case where there were only the father and the minor son and the question was whether such arrangement could bind the son. It cannot be said that their Lordships shut the door upon considering such arrangements binding if really they are beneficial to the minor members and when there are other adult members of the family to represent them or for the matter of that if they should be properly represented by guardians. If, for once, the possibility of those arrangements is conceded, their validity also would seem to follow, granted the circumstances justify the course, to avoid the less desirable eventuality of a partition [see *Patrachariar* v. *Srinivasachariar* (5)]. The idea of a will with consent of the other members their Lordships consider to be inadmissible though the language used in *Brijraj Singh* v. *Sheodan Singh* (6) would seem to suggest the legal possibility of one.

2. (1924) I L R 49 B 118. 3. (1911) I L R 35 B 393.
4. (1920) I L R 43 M 824.
5. (1917) I L R 40 M 1122: 32 M L J 364.
6. (1913) 35 A 337: 25 M L J 188 (P C).

KISHAN DEI v. SHEO PALTAN, I. L. R. 48 All. 126.

This case is an illustration of the extent to which a Court has to go when instead of confining itself to the text or the clear implications of the text of the law it embarks upon a consideration as to what is blameworthy and what is not. If that were the test, one fails to understand why the Gandharva form is blameworthy at all. Pursuing that course, considering what the community considers blameworthy and what the Court should consider blameworthy and arriving at some compromise possibly between the two, the Court declares itself unable to say it is blameworthy and pronounces acting upon the presumption that the form is Brahma—that it is Brahma. When Manu declares that Panigrahana mantras are not intended for a woman who has been once married, to regard such a person as married in an approved form within the meaning of the very Smritikara who says that seems to be going too far. We do not believe that the text of Yajnavalkya as to inheritance to Stridhan property contemplates marriages necessarily to fall within the eight categories mentioned. Marriages may be one of those eight and may be some other kind and when it is some other kind, the mode of inheritance is that prescribed for the Asura and Gandharva forms. In the case of Asura, the theory is that the wife does not, strictly speaking, cease to belong to the family of the father and as such the father and the relations of the father succeed in the absence of issue. The idea of change of gotra or family for a widow seems to be ludicrous and a question would necessarily arise as to the relations of which of her husbands should have preference to her property. A change of gotra by disposal by a person who has authority to do so is at the foundation of this rule of inheritance and would seem to exclude the widow marriage from it. It is not quite accurate to say that the Smritis do not contemplate a second marriage for women. Some at least of the kinds of Punarbhus seem to be remarried women and there is more than one text which permits a second marriage and Kautilya refers to a divorce in certain circumstances. We should fancy such cases appropriately to come within the other than the four stated "Prashasta" forms and to be governed by the rules of inheritance governing the named "Aprashasta forms."

FATIMA-UL-HASNA v. BALDEO SAHAI, I L R 48 All. 188 (F B).

Here the Full Bench takes the same view of the construction of O. 21, R. 89, as the Full Bench case of the Madras

High Court in *Sundaram* v. *Mausa Mavuthar* (1). In fact, this is the view taken by all the other High Courts. The High Court of Allahabad took the strange view that neither the judgment-debtor nor his alienee after the sale could apply to set aside the sale—which is overruled in this case.

BHAGWATI DAYAL *v.* DHAN KUNWAR, I. L. R. 48 All. 329.

The question as to what orders are final within the meaning of S. 109, Civil Procedure Code—in fact as to what is the test of finality—can hardly be said to be finally settled. The particular order in question in this case was one refusing to record a compromise. There could be no question that if the Court had ordered the compromise to be recorded, the case would have terminated and there would have been appeal though in *Salaman* v. *Warner* (2) the view taken were that such order, as in another contingency, would not have terminated the suit could not be regarded as final. The view taken in some cases in India [see *Khagendra Nandan Asram* v. *Sahayram* (3), *Saratmani Debi* v. *Bata Krishna Banerjee* (3), *Meghraj* v. *Bidyabati Koer* (5)] that an order which if it was the other way would have terminated the suit must be regarded to be final also has not found acceptance with all the Courts and is opposed to the decision in *C. T. Cogstad and Co.* v. *H. Newsum Sons and Co.* (6). The Bombay Court in *Shankar Bharati* v. *Narasimha Bharati* (7) held that such an order was only interlocutory. This view is supported by the decision in *Croasdell and Cammell, Laird and Co., Limited, In re* (8) where an order setting aside an arbitration on the ground of misconstruction of the order of reference was held to be not final. This view does not preclude the Courts in giving leave for appeal in proper cases but their Lordships say that such leave should be given only when the appeal is likely to determine finally the rights of parties—a test which, we apprehend, might bring the order within the category of final orders.

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1. (1921) I L R 44 M 554 : 40 M L J 497 (F B).
2. (1891) 1 Q B 734.
3. (1921) 25 C W N 896.
4. (1909) 10 C L J 336.
5. (1914) 21 C L J 279.
6. (1921) 2 A C 528.
7. (1922) I L R 47 B 106.
8. (1906) 2 K B 569.

RAM CHARAN LONIA *v.* BHAGWAN DAS MAHESHRI, I L R 48 All 443 (P C).

In this case, a Hindu father first executed a simple mortgage for necessity and then entered into two contracts of sale to pay off the mortgage one after the other. The mortgage provided for 8 1|2 per cent. compound interest. The High Court held that that was an exorbitant rate and allowed only 8 1|2 per cent. simple interest. Their Lordships were not prepared to hold that the interest was exorbitant without evidence merely because it was compound interest. The first contract fell through and then the vendee under the second contract brought a suit for specific performance and the question was whether the contract was binding.

Their Lordships while holding that the circumstances justified entering into a contract for sale and the terms so far as the price went were not objectionable, nevertheless held that the contract did not bind the other members of the family in the circumstances of the case inasmuch as there was already a contract in operation which made it possible and even prudent for the other side to put off performance of the second contract indefinitely with the result that the mortgage ate up the whole of the purchase money.

Another question that arose was as to the terms of the decree to be passed. The Sub-Judge had made a decree for specific performance and under that decree the plaintiff got into possession and discharged the mortgage. The question was whether the new situation thus created should be dealt with by the judgment though it was not strictly connected with the subject-matter of the suit. Their Lordships say that it might be dealt with and proceed to deal with it. They do not allow him the interest which the mortgagee would on their Lordships' view have been entitled to but they do not approve of the course taken by the High Court in disallowing all interest from the date of taking possession. Instead they treat him as a usufructuary mortgagee taking possession under an order of the Court not liable to account for the profits nor entitled to interest after taking possession. On the principle of subrogation, the vendee would have been entitled to interest at the mortgage rate. Their Lordships apparently regard that the Court has power even in such cases when justice demands such a course to regulate the extent to which the original contract should be enforced.

RAJ BAHADUR *v.* NARAIN PRASAD, I L R 48 All. 482.

Having regard to O. 22, R. 5, the decision of their Lordships in this case that it is not open to a party who is decided by the Court not to be a representative of a party in the suit to sue the other side in a separate suit for a declaration that he is and get relief on that footing seems to be undoubtedly right. But of course, it does not follow that when the decision is between two persons claiming as representatives that decision is conclusive as between them even as regards the subject-matter of the suit. *Parsotam Rao* v. *Janki Bai* (1), *Balabai* v. *Ganesh* (2) and *a fortiori* when the subject-matter is different, *Pakkran* v. *Pathumma* (3). As their Lordships point out in the last case "the question whether a person should be admitted as legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for decision in the suit itself. It is really a matter collateral to the suit and one that has to be decided before the suit itself is proceeded with. The Civil Procedure Code does not provide for an appeal against an order deciding the question though the repealed Code did." The last consideration is not conclusive no doubt on the question of *res judicata* (*see* S. 11, Expl. II), but it cannot be overlooked in deciding whether a conclusive effect could have been intended to be given to such an order. The determination is final so far as the purposes of the suit are concerned, *i. e.,* it is no longer open to the unsuccessful claimant to set up his title as representative as against the defendant with a view to getting the relief claimed in the suit and on the cause of action alleged in the plaint. But it does not preclude him from setting up the right as against the successful claimant and claiming the fruits of the litigation from him nor does it preclude him from setting up the same title as against the defendant in respect of a different cause of action or different subject-matter. The decision under consideration does not seem to notice the distinction and dissents from *Parsotam Rao* v. *Janki Bai* (1) which deals with this aspect of the question.

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1. (1905) I L R 28 A 109 2. (1902) I L R 27 B 162.
3. (1915) 25 M L J 279.

RAJENDRA NATH CHATTERJEE *v.* MAHES LATA DEBI, I. L. R. 53 Cal. 270.

The point that came up for consideration in this case is a short one, namely, whether a memorandum of cross-objections can be preferred by a respondent against one who is not a party to the appeal though he was a party in the Lower Court and whether the latter can be added as a party to the appeal for that purpose and the learned Judges have answered it in the negative. A similar view has been taken by the Patna High Court in *Bakshi Bindeswari Prasad* v. *Dheninder Das* (1). Though the point is a short one, its decision has not been uniform in the various High Courts ; and if it were to come up before the Madras High Court that Court would be inclined to decide it in the affirmative following its prior decision in *Ponnuswami Asari* v. *Palaniandi Mudali* (2) where the rules in O. 41 of the Civil Procedure Code have been subjected to a very careful examination. Even in Calcutta, the trend of judicial decisions on this question has not always been on a line with the case under review. Reference may be made in this connection to *Annud Chunder Goopto* v. *Mohesh Chunder Mozoomdar* (3) and *Pran Kishore Deb* v. *Mohamed Ameer* (4), which are to the contrary effect. We are not sure that the wide language of the terms of S. 348 of the Code of Civil Procedure of 1859 under which these cases were decided can be emphasised as empowering the Appellate Court to entertain a memorandum of objections even against a person who is not a party to the appeal, as in spite of such generality of expression a restricted meaning was given and it was held by the Calcutta High Court under that Code that a respondent could not prefer a memorandum of objections against another respondent. *Maharajah Tarucknath Roy* v. *Tuboorun-nissa Chowdhrain* (5), *Goonomonee Dossia* v. *Parbutty Dossia* (6) and *Muhboob Ali* v. *Ali Zur Banoo Bibee* (7). Whatever might have been the correct view under the Code of 1859, with the enlarged powers of the Appellate Court to do justice under O. 41, R. 33 of the Code of 1908, we venture to submit that the Court is not incompetent to add a party in appeal even though it may be to enable a respondent to the appeal to prefer a memorandum of objections against him, and that the construction of the rules adopted in *Ponnuswami*

1. (1916) 2 P L J 162.
2. (1919) 11 L W 602.
3. (1864) 1 W R 229.
4. (1874) 21 W R 358.
5. (1866) 7 W R 39.
6. (1868) 10 W R 326.
7. (1868) 9 W R 78.

Asari v. *Palaniandi Mudali* (2) is more in consonance with the spirit of the present Code. While on this question, we would point out that the Madras High Court has taken a different view from that of the Calcutta High Court on a respondent's right of preferring a memorandum of cross-objections against another respondent. [*Muniswami Mudali* v. *Abbu Reddi* (8)].

UMASHASHI DEBI *v.* AKRUR CHANDRA MAZUMDAR, I L R 53 Cal. 297.

We are not sure that if in this case the plaintiff had not asked for a declaration that the execution purchase by the defendant was *benami* for him but had merely relied on his possession as the ground of his title and sought to recover possession from the defendant or for the confirmation of his possession, the learned Judges would still have held that the suit was barred by S. 66 of the Civil Procedure Code, although there are some observations in the judgment of Cuming, J. which tend to suggest that even such a suit would be barred. In such a case we venture to think that the plaintiff would be entitled to succeed as the ground of his claim would be his prior possession which is a good title in itself as against all persons except the real owner and the defendant would be bound to prove his superior title to the property and the plaintiff would not then be precluded from showing the *benami* nature of the defendant's purchase in reply when the latter sets up his execution purchase. It is perhaps possible that the opinion of the learned Judge is tinged by the view held by the Calcutta High Court that prior possession by itself is not a ground of title unless it comes within the terms of S. 9 of the Specific Relief Act, a view entirely opposed to the current of authority elsewhere in India and not accepted even in Calcutta without murmur. See *Naba Kishore Tilakdas* v. *Paro Bewa* (9), per Suhrawardy, J., one of the latest instances. The view that is generally accepted elsewhere was forcibly put forward by Bhashyam Aiyangar, J. in *Narayana Rao* v. *Dharmachar* (10), and has been the settled law in England since at least *Asher* v. *Whitlock* (11). If thus prior possession in the plaintiff by itself is a ground of title which has to be displaced by the proof of a better title by the defendant, there

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2. (1919) 11 L W 602. 8. (1915) I L R 38 M 705 : 27 M L J 740 (F B)
9. (1922) I L R 50 C 23. 10. (1902) I L R 26 M 514 : 13 M L J 146.
11. (1865) L R 1 Q B 1.

seems to be nothing in S. 66 of the Civil Procedure Code to preclude the real owner bringing such a suit against the certified purchaser and courts are not prohibited from trying an issue as to the *benami* nature of the purchase which would become relevant to the case on the plea of the defendant relying on his execution purchase. While on the one hand there is no warrant for placing a restricted interpretation on the terms of S. 66 limiting it to cases where the purchase is *benami* for the judgment-debtor, as pointed out in *Harish Chandra Guha* v. *Nripendra Kumar Chuckerbutty* (1), there is equally no warrant for widening its scope as was done in *Hanuman Pershad Thakur* v. *Jadu Nandan Thakur* (2) by investing the certified purchaser with full title to the property. If it were otherwise, the certified purchaser would not only be entitled to defend a suit based on the *benami* character of his purchase, but could also himself sue on foot of his execution purchase a position which has never been conceded to him. Indeed even in the case of *Bisham Dial* v. *Ghazi-ud-din* (3) it was pointed out by Strachey, C. J. that S. 317 of the Code of 1882 corresponding to S. 66 of the present Code should be strictly construed and that the only kind of suit that was barred by the section was the one brought against the certified purchaser *and based on the ground that the purchase was made on behalf of the plaintiff or his predecessor-in-title;* and the learned Chief Justice leaves open the case of a suit by the real owner based on his prior possession. It would thus seem to follow that whatever may be the correct decision of the case in *Sasti Churn* v. *Aunopurna* (4) on the facts of that case, the observations extracted from the judgment in that case in the decision under notice lay down, with all respect, the correct law on the question and a suit based on possession alone will not be barred by S. 66 of the Civil Procedure Code.

SRIPATI DATTA *v.* BIBHUTI BHUSAN DATTA, I. L. R. 53 Cal. 319.

In this case the learned Judges have laid down that there is a right of appeal under O. 43, R. 1, cl. (*s*) of the Civil Procedure Code against an order removing a receiver. Such an order is clearly not one falling within the terms of O. 40, R. 1 or R. 4 of the Civil Procedure Code against which only a right of appeal is provided. With all respect, we fail to

1. (1920) 24 C W N 1024.
2. (1915) I L R 43 C 20.
3. (1901) I L R 23 A 175.
4. (1896) I L R 23 C 699.

see how S. 16 of the General Clauses Act which merely empowers an appointing authority to remove the officer so appointed has any bearing on the right of appeal against an order removing him. On the other hand, there are two decisions of the Calcutta High Court and another of the Madras High Court in which it has been held that an order refusing to remove a receiver is not appealable. [See *Eastern Mortgage and Agency Co., Ltd.* v. *Premananda Saha* (1), *Ramdayal* v. *Motiram* (2) and *Ramaswami Naidu* v. *Ayyalu Naidu* (3)]. If these decisions which proceed on the language of O. 40, Rr. 1 and 4 and O. 43, R. 1, cl. (s) are correct, it would be difficult to reconcile them with the present case, because if an order removing a receiver is appealable, an order refusing to remove a receiver would seem to be likewise appealable. In the case of *Eastern Mortgage and Agency Co., Ltd.* v. *Premananda Saha* (1) referred to above, Mr. Justice Woodroffe, sitting with Coxe J., held that an order on an application for the removal of a receiver is not appealable. Apparently these decisions were not brought to the notice of the learned Judges in the present case. It is not therefore clear, what their decision would have been if these cases had been referred to.

PANCHAM *v.* ANSAR HUSAIN, I L R 48 All 457 (P C).

The question before the Privy Council in this case was as to whether when a document of mortgage fixed a date for payment but in the meanwhile also required an annual payment to be made in default of which the whole was to fall due, and there is default whether limitation begins to run on the default absolutely or only at the option of the mortgagee. Their Lordships state the point and recognise its importance. *Prima facie* they do not seem to be quite satisfied about the correctness of the Allahabad view that limitation starts from the default, but the plaintiff having framed his plaint on the footing that the cause of action arose on the default and that limitation was saved by certain payments and the same having been found against, their Lordships held that the plaintiff was precluded from raising the point that the cause of action arose on the date fixed for payment.

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1. (1914) 20 C W N 789. 2. (1913) 24 I C 863.
3. (1923) 46 M L J 196.

HOPE PRUDHOMME & CO. *v.* HAMEL AND HORLEY, LIMITED, I. L. R. 49 Mad. 1 (P. C.).

The question in this case was largely one of fact as to whether the respondents were merely agents or though ostensibly agents really purchasers acting independently which, as their Lordships observe, happens very often in modern business especially in the motor trade. Their Lordships held agreeing with the High Court that they were merely agents and that as really they acted on their own account as principals, the appellants were entitled to repudiate the contract. Their Lordships held on the evidence that the appellants had not ratified the transaction.

GOPALAKRISTNAYYA *v.* LAKSHMAN RAO, I. L. R. 49 Mad. 18 : 49 M. L. J. 590 (F. B.).

In this case, the Full Bench held, we think rightly, that a Memorandum of Appeal presented against a dead man might be amended in a proper case so as to make it an appeal against the legal representatives, though so far as the question of limitation goes, the appeal will date only as from the date of the amendment so that the Court will have to excuse the delay if time has expired by that time. We fail to appreciate why the Court should not amend the plaint also in a similar case provided the period of limitation has not expired. In the case of suits the Court has, of course, no power to excuse delay as in the case of appeals. The law has been laid down in a contrary sense in *Veerappa Chetty* v. *Tindal Ponnen* (1) and several cases following it though inconsistently enough, it has also been laid down in the case of execution petitions that such petitions amount to applications in accordance with law to execute or to take a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act.

VENKU SHETTITHI *v.* RAMACHANDRAYYA, I. L. R. 49 Mad. 29 : 49 M. L. J. 634.

Art. 134 of the Limitation Act has been the subject of much judicial controversy and one is hardly certain to have seen the last of it.

In this case, the defendant was a transferee from a mortgagee who claimed to be a vendee with an agreement to re-

1. (1907) I L R 31 M 86: 17 M L J 551.

sell and purported to sell the property absolutely alleging that by reason of the default of the vendor (mortgagor) in payment his title had become absolute. The question was whether to such a case Art. 134 applied. Their Lordships held it did. *Bona fides* is no longer a necessary condition for the application of the article. The knowledge that the transferor is a mortgagee would seem to be material only for the purpose of showing that what was intended to be transferred was only a mortgage interest or an interest whatever it is that the document confers. If it could be affirmed that the transfer is only of the interest under the document whatever that might be, the article would not apply. Between that case and the present where the party believed he had an absolute interest under a deed which in its proper construction was a mortgage and purported to transfer such absolute interest as conferred by that deed the distinction is somewhat fine but nevertheless real.

MAHARAJA OF VIZIANAGRAM *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 49 Mad. 249 : 50 M. L. J. 391 (P. C.).

In a case somewhat analogous to the case under review *Arun Chandra Singh* v. *Kamini Kunwar* (1) their Lordships of the Privy Council held that an abatement of rent by reason of diluvion did not disentitle the patnidar from claiming the diluviated land when it re-formed *in situ* some years after. In the case of ryotwari proprietors in a similar situation, in the present case, their Lordships came to an opposite conclusion. The true explanation for the distinction lies apparently in the difference in the nature of treatment in the two cases. If the case was one of remission of rent which their Lordships point out could only be done by the Board of Revenue, the conclusion would have been different. Otherwise if the ryotwari proprietor retained his holding, he was bound to pay revenue. The only way he could get rid of his liability to pay it is by surrendering. If he ceased to pay revenue and the land was struck out of his patta, the only inference is according to their Lordships that he has surrendered the holding.

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1. (1915) I L R 41 C 683: 26 M L J 251 (P C).

JANAKIRAM *v.* NAGAMONY MUDALIAR, I L R 49 Mad. 98: 50 M L J 413.

While conceding that a gift can be made to a joint family as such, their Lordships hold that there is no presumption in favour of such grant in the case of a gift by a brother in favour of his divided brother and his sons and in the absence of words showing an intention to make such a grant the donees must be presumed to take as tenants-in-common. In the case of a gift by the father to the son, according to the Madras and Calcutta rulings there is such a presumption but that is because if the property came in the ordinary course of devolution, it would have been taken by them with the incidents of joint family property. Those incidents do not attach to properties got by collateral succession and as such there is no room for the presumption that the property is intended to be taken with those incidents.

One of the subordinate questions discussed in the case is as to whether there could be joint family without joint family property. Their Lordships hold there could be and they are undoubtedly right. In fact, the well-known passage of Nilakanta where he is taken to have laid down that partition is effected by a co-parcener declaring that he is divided from others relates to a family without property. "Even where there is a total failure of common property, a partition may also then be made, by the mere declaration "I am separate from thee." Vyavahara Mayukha, S. 3.

AYISWARYANANDAJI SAHEB *v.* SIVAJI RAJA, I. L. R. 49 Mad. 116 : 49 M. L. J. 568.

Three important questions arose for decision in this case. (1) As to the devolution of the trusteeship of certain temples, (2) as to the devolution of the accumulations by the widows from the income of the husband's estate, (3) as to the right of the illegitimate sons of the husband to inherit to the Stridhanam of his widows. On the first question while holding that in the absence of any usage to the contrary the trusteeship would have devolved on all the heirs, their Lordships hold that having regard to the usage of the institution that only a single heir who was the Raja managed the institution, the same usage should continue and the fact of the regrant

by the British Raj to the widows (who also managed one after the other) is no justification for presuming an abrogation of the old usage. On the second question, Mr. Justice Spencer holds that there could be no question of accretion in the case when the widows were not in possession of the corpus at all but were only receiving a share of the income from the Collector, while Mr. Justice Kumaraswami Sastriar re-affirmed the current of opinion in the Madras High Court that such accumulations are presumed in the absence of evidence to the contrary to be the stridhanam of the widow—a view which has been referred to with apparent approval in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (1) by the Privy Council while the rule is stated in a contrary sense in *Nabakishore Mondal* v. *Upendra Kishore Mondal* (2). His Lordship declined to take the last as the considered opinion of their Lordships on the question having regard to the fact that no reference is made therein to the earlier decisions. As regards Mr. Justice Spencer's opinion as the accretion is not a physical accretion but an accretion to the estate, it is difficult to see why possession is material though if as it may happen in some cases, she had no right to the corpus but only to the income, the question of accretion may not arise. This does not seem to have been such a case. The appointment of a receiver at the instance of a reversioner cannot, we fancy, preclude the possibility of an accretion, any more than the fact that the property is left in the hands of a manager appointed by the widow herself. On the last question, it was argued on the analogy of the cases that hold that co-widow, step-daughter and step-daughter's son come in as sapindas, that the illegitimate son also should be entitled to succeed as the heir of the father. The argument is repelled on the ground that the cases have refused him the right of collateral succession. The ground of decision is hardly satisfactory. The growth of law on this branch has not been quite consistent. While on the one side his right to collateral succession is denied, on the other, right of survivorship on the death of the legitimate brother has been conceded to him and similarly right of representation in his legitimate issue has been recognised and lastly the right of the father to succeed to him has also been recognised. In refusing to recognise his right the Courts are still fighting shy of recognising him as sapinda and in fact, they are re-affirming the theory of the

1. (1918) I L R 42 M 581: 36 M L J 164 (P C).
2. (1921) 42 M L J 253 (P C).

early Madras cases that the illegitimate son takes by reason of the special text and by reason of his relationship as such —much in the same way as women are said to take by reason of special texts and not by reason of their relationship. He might be a sapinda or he might not be, but he is not a sapinda with any but the very qualified rights of succession conceded to him by the text.

KHALIL *v.* LES TANNERIES LYONNAISES, I. L. R. 49 M. 435 (P C).

Two questions arose in the case, both in their nature technical. The first was: A suit was filed against *A* and *B*. The first Court gave a decree against *A* but dismissed the suit against *B*. An appeal was filed by *A* and *B* against whom a decree for costs had been made by the first Court and on that appeal, the High Court dismissed the suit against *A* also. The further appeal was by the plaintiff against both *A* and *B*. Their Lordships hold that an appeal could not be filed by the plaintiff against *B* against whom the suit had been dismissed and no appeal had been filed to the High Court. The ground of their Lordships' decision is that so far as *B* was concerned there was no appeal and therefore the appeal to the Privy Council must be considered as one directly from the judgment of the first Court which it was not permissible to do under the Civil Procedure Code. The fact that under O. 41, R. 33 the Court might have exercised a power to vary the judgment against him was not sufficient to convert the appeal in the Lower Appellate Court into one against him. If the Lower Appellate Court had chosen to act under O. 41, R. 33 the case might have stood on a different footing. Their Lordships further hold that O. 41, R. 33 does not apply to the Privy Council.

The second question was one relating to the admission of evidence in appeal. On this, their Lordships could not be said to have made any unsettling sort of pronouncement but merely raise a word of caution against a too free admission of evidence in appeal.

RAJAH OF RAMNAD *v.* KAMID ROWTHAN, I. L. R. 49 Mad. 335 : 50 M. L. J. 503 (P. C.).

In this case, an important question as to the rights of occupancy tenants in trees arose.

There might be three situations in which the trees might be held. The question here was as to palmyra trees.

(*i*) They may be growing on the land held by the ryot and no mention is made of them.

(*ii*) They may be on the land held by him but the trees might be treated as a separate entity.

(*iii*) They may be let to a person on whose land they do not grow.

In the first case, their Lordships are clear that S. 12 applies and the tenant is not liable if he cuts down the tree. The ingenious distinction made between the right to cut and the right to appropriate and rejected by the High Court has apparently been also rejected by their Lordships. Equally their Lordships are clear that the tenant is liable in the third case and for the full value of the trees cut.

Their Lordships remit the case to the High Court for consideration as to what should happen in the second case.

LALA PUNJASHET *v.* MOTIRAM BUDHU, I. L. R. 50 Bom. 192.

This decision brings about uniformity in the construction of the expression "other sufficient grounds" in O. 23, R. 1 (2) (*b*) of the Civil Procedure Code by understanding it as being *ejusdem generis* with "some formal defect" in sub-clause (*a*). This has been the view held in the other High Courts as may be seen from *Aiya Koundan* v. *Gopanna Marudiar* (1), *Mahendra Ram* v. *Singi Lal* (2) and the other cases referred to in the judgment; but it is not clear what the genus of which formal defect is a species. Merely saying that the other causes must be analogous to formal defect does not give a clear idea as to what those causes might be. Again the formal defect referred to in sub-rule (*a*) must be such as to cause the dismissal of the present suit; but the other grounds referred to in sub-rule (*b*) are not such as would cause a failure of the present suit but grounds for allowing the institution of a fresh suit on the same subject-matter. It may be a question whether the rule of *ejusdem generis* can be applied when the purposes differ and are not similar as stated above. No doubt the word "other" in sub-clause (*b*) would seem to suggest in the case mentioned in sub-clause (*a*) a fresh suit may be instituted. On the nature of the rule of *ejusdem generis* in the construction of statutes, deeds, etc., we would refer to the exhaustive treatment of it by McCardie, J. in *SS. Magnhild* v. *McIntyre Brothers and Co.* (3) to show the extent of obscurity in which the rule is involved. It is however settled before the rule can be applied that one should be able to settle the genus of which the previously mentioned categories form species. If that is not possible the general words cannot be restricted in their meaning. Again the previous words should not exhaust a genus by themselves. The learned Judges have referred to *Chhaju Ram* v. *Neki* (4) in support of the *ejusdem generis* construction. To show that the rule is not inflexible we would refer to *Shankar Ganesh Dabir* v. *Secretary of State for India* (5), where the *ejusdem generis* rule was not adopted. Reference may also be made to the judgment of Hill, J. in *Le Mesurier* v. *Wajid Hossain* (6) as to the limits of the application of

1. (1914) 27 M L J 480.
2. (1918) 3 P L J 651.
3. (1920) III K B 321.
4. (1922) 49 I A 144: 43 M L J 332 (P C).
5. (1922) 49 I A 319: 49 C 845: 44 M L J 32 (P C).
6. (1902) I L R 29 C 890 (F B).

the rule. It may also be doubted whether any serious consequence would result even if the *ejusdem generis* rule is not adopted in this case as the matter rests in the discretion of the Court whether the leave to institute a fresh suit is to be given or not in each case. We would in this connection draw attention to the observations of Sadasiva Aiyar, J. in *Kamu-swami Pillai* v. *Jagadambal* (7) on this question.

FRAMROZ EDULJI *v.* MAHOMED ESSA, I. L. R. 50 Bom. 266.

It is somewhat remarkable that the view of the Madras High Court in *Best* v. *Haji Muhammad Sait* (8) that interest on a promissory note payable on demand, where no interest is provided for, runs only from the date of demand and not from the date of the promissory note itself under S. 80 of the Act, has gone without challenge, so long. Even Messrs. Bhashyam and Adiga in their commentaries on the Negotiable Instruments Act have cited that case without comment. It is well settled that when the expression "on demand" is used in a promissory note, it means that the note is payable immediately on its execution and no demand is necessary before payment is due. See *Seetharamayyar* v. *Muniswami Mudaliar* (9) and *Norton* v. *Ellam* (10). *Cf.* Art. 73 of the Limitation Act. If therefore no demand is necessary to render the amount under the note payable, it seems difficult to support the decision in *Best* v. *Haji Muhammad Sait* (8) and the learned Judges in this case have, if we may say so with respect, rightly dissented from the ruling and come to the conclusion that interest at 6 per cent. per annum is payable in such a case from the date of the execution of the note itself.

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7. (1918) I L R 41 M 701: 35 M L J 27.
8. (1899) I L R 23 M 18. 9. (1919) M W N 185: 9 L W 427.
10. (1837) 2 M & W 461.

PARBATI CHARAN MUKHERJEE *v.* AMARENDRA NATH BHATTACHARJEE, I. L. R. 53 Cal. 418.

This decision is useful as indicating the limits of the rule avoiding an instrument by reason of its material alteration. The law on the subject in this country is derived entirely from the English decisions, and the review of the English cases on this question by the learned Judges will therefore be found particularly helpful. A material alteration of a document after its execution by or with the consent of any party thereto or any person entitled thereunder but without the consent of the party or parties liable thereunder renders the deed void with the result that no action can be maintained on the instrument. The avoidance, however, does not prevent the instrument being used for proving a collateral fact as, for instance, the acknowledgment of a pre-existing liability to pay a sum of money, even though it may be to the person who made the alteration, provided the obligation sought to be enforced is not one arising on the covenants in the instrument. If, however, the pre-existing obligation is merged in the instrument materially altered, all rights would be extinguished by the material alteration. These are the principles given effect to by the learned Judges in the case, where the pre-existing liability was not merged in the mortgage bond and the acknowledgment of the pre-existing liability in it was allowed to be given in evidence in a suit based on the original liability ; and the learned Judges consequently granted a money decree.

There is one other aspect of this branch of the law that we wish to draw attention to. The avoidance in the case of a materially altered document is not, it must be noticed, *ab initio* or so as to nullify any conveyancing effect. Reference may be made in this connection to *Hipkins* v. *The Birmingham Gas Light Company* (1) where it was held that notwithstanding a subsequent cancellation of a lease deed, the lessor could recover the rent as it was incident to his reversion created by the lease. *See* also Norton on Deeds, pp. 29 to 31 for a full discussion of the question and the cases bearing on the same. So that, if by the conveyance prior to the date of the material alteration any interest became vested in the mortgagee, vendee or lessee, it will not be divested on a material alteration of its terms. The result will be that in this case there will be a valid mortgage on the property created at the time of the original execution of

1. (1860) 5 H & N 74 at 87.

the mortgage, if the property mortgaged was movable property. If the property was immoveable, it may be a question whether by reason of registration of the document on a date subsequent to the alteration its operation takes effect on the document from the time of its original execution and prior to the alteration, by virtue of S. 47 of the Registration Act. If by such relation back, the document becomes a duly registered document at the moment of its original execution itself, the mortgage interest that may thereby become vested in the mortgagee cannot be divested by the subsequent alteration. It would then be a further question how far the mortgage right so vested can be enforced by suit. It has been held in such a case the person entitled cannot enforce the covenants contained in the materially altered document. Cf. *Davidson* v. *Cooper* (2). But supposing under a usufructuary mortgage, or an English mortgage, the mortgagee had entered into possession, he cannot be ousted from possession and it would also seem he can even recover possession on foot of his title. This branch of the rule has obviously no application to the case on hand as what is sought to be enforced is the covenant under the mortgage bond which, as pointed out above, cannot be enforced by reason of its material alteration.

PURSHOTAM HURJIWAN *v.* NAVNITLAL HURGOVANDAS, I. L. R. 50 Bom. 275.

The questions discussed in this case are of great interest on the law of contempt of Court. An application was made by a Hindu husband for the custody of his wife from her parents. The matter was heard *in camera* by a Judge on the original side sitting in chambers. The Judge having no time to deliver a detailed judgment expressed his conclusions and said that he would give his reasons on a later date. Between the two dates, one of the parties published a report of the proceedings which was inaccurate in some respects; and an application was made to commit him for contempt. The Trial Judge and the Appellate Bench both held that the party was in contempt. Prior to the decision of the House of Lords in *Scott* v. *Scott* (3), it was held in England, that Courts had an inherent jurisdiction to hear cases *in camera* and this right was frequently exercised in matrimonial cases; so much

2. (1843) 11 M & W 778 at 800.

3. (1913) A C 417.

so, hearing cases *in camera* became a rule of practice whenever Judges in any jurisdiction thought that such a course was called for. When the whole question came up for review before the House of Lords in the above case, it was examined by the noble Lords from all points of view and it was held that except in cases relating to wards and lunatics and in cases of trade secrets and possibly also in some cases where justice could not be done if the hearing is in public, there is no jurisdiction in any Court to hear cases *in camera;* and the publication of the proceedings held *in camera* in a suit for nullity of marriage was held not to be a contempt of Court, although there was a consent order for a hearing of the case in private. In the present case there can hardly be any doubt that a publication of matter which was not an accurate report of the proceedings, especially before the delivery of the final judgment in the case would amount to a contempt of Court. But if the case is to be understood as laying down anything more, the matter is not without difficulty. Taking it for the present purpose that the proceedings had terminated and there was nothing inaccurate in the report, an order to conduct the hearing *in camera* does not put a ban of secrecy for all time in future. This is made perfectly clear by the House of Lords themselves; otherwise even the report of the case itself in the Law Reports may become a contempt as Lord Shaw remarked in the same case. It may be noticed in passing that the guardianship case itself in the present instance is reported in *Navnitlal Hurgovandas* v. *Purshotam Hurjiwan* (1).

Again, if as Lord Halsbury observed in the case, the proceedings of the Court when exercising jurisdiction in matters of wards have no relation to the public administration of justice but the Judge merely acts as an arbitrator dealing with family disputes, it may be a question whether the principles of the law of contempt as applicable to Courts of justice can be applied to the case. It is not clear whether the law of contempt can be applied to the case of a domestic forum like a caste panchayat. But it is possible that in the cases of guardians and wards the Court fills the dual capacity of a Court of justice and of administering the affairs of the ward as pointed out by the Lord Chancellor, Lord Haldane.

On the question of the disclosure of proceedings in chambers other than the specified cases of wards, lunatics and

1. (1925) I L R 50 B 268.

trade secrets, the learned Judges have reserved their opinion in the present case. But with all respect, we venture to think that the practice of secrecy and non-disclosure of those proceedings are entitled to no more consideration than the practice which had grown up in the English Courts about hearing cases *in camera* and the non-disclosure of those proceedings which was, despite, declared to be illegal and without jurisdiction and which even the consent of parties would not cure, as pointed out and explained by the House of Lords. After the examination of the question by Lord Shaw in the House of Lords case, there seems to be nothing to be said in favour of the legality of the practice said to be prevailing in the Bombay High Court of keeping private the proceedings and decisions arrived at in chambers in respect of all matters.

NAND LAL SARAN *v.* DHARAM KIRTI, I. L. R. 48 A. 377.

The question in this case was as to the proper construction to be put upon Explanation I of Art. 182 of the Limitation Act. A decree had parts. Part of it was jointly passed against all the defendants and in another part it was passed severally against the various defendants. The question was whether application in respect of the latter portion will save limitation as regards the former portion. Their Lordships hold, not. They think that neither part of the explanation applies to the case if you take the words literally. They would take each part and apply the explanation to that part. In other words, they would treat the joint portion of the decree as a joint decree, and several portion of the decree as a several decree. *Prima facie* the conclusion seems reasonable. The Madras High Court in *Subramania Chettiar* v. *Alagappa Chettiar* (1) apparently takes a different view and holds that if any part of the decree is joint, the decree must be treated as a joint decree. The case itself was one in which there were two parts—one part a joint decree against three people and another part a joint decree against two of them—so that the case was one of joint decree. But the case has been taken as laying down the wider position. See *Pattannayya* v. *Pattayya* (2). The same view is taken by the Calcutta High Court in *Barada Kinkar* v. *Nabin Chandra* (3). This much is to be said in favour of that view that apart from the explanation there is no reason to confine the saving quality to applications against the particular person or in respect of any particular subject-matter. The explanation restricts the operation of the article against the subject. The proper way of construing it is to take it literally. If it applies to a particular case in terms, all right and good. If it does not, there is no reason why the article should not be taken to apply unqualified by the explanation which comes to the same thing as saying that the definition of a joint decree is to be applied to all cases to which the other definition does not apply.

EMPEROR *v.* KALWA, I. L. R. 48 All. 409.

In this case, the Allahabad High Court prefers the ruling of the Calcutta High Court in *Emperor* v. *Ashootosh Chuckerbutty* (4) that a conviction should not be based on the uncorroborated confession of a co-accused to that in *Emperor* v. *Kehri* (5) that such a conviction is

1. (1906) I L R 30 M 268.
2. (1925) 50 M L J 215.
3. (1909) 11 C L J 85.
4. (1878) I L R 4 C 483.
5. (1907) I L R 29 A 434.

not unlawful or improper. Corroboration according to their Lordships must point to the identification of the person charged with the particular act. This is in accordance with the general trend of opinion in the other High Courts.

RAM SAHAI *v.* MADAN LAL, I. L. R. 48 All. 432.

In this case their Lordships were put to considerable difficulty by the Full Bench judgment in *Yad Ram* v. *Sundar Singh* (1). The Lower Courts decided that a mortgagee of a decree was not entitled to apply under O. 21, R. 16 to execute the decree, following some ruling of the High Court which their Lordships are at pains to show did not apply to the facts of the case. This, they consider, sufficient for them to interfere with the judgment of the Lower Court. In plain English, the Lower Court had committed an error of law. If, as the Full Bench held, an erroneous construction put upon the Statute by which the particular application was held not to be entertainable was not a question of jurisdiction, illegality or material irregularity, this was *a fortiori*. But we agree that the decision of the Full Bench is wrong and requires re-consideration.

SHEO PRASAD *v.* NARAINI BAI, I. L. R. 48 All. 468.

This case adds a new terror to decree-holders whose troubles begin, as observed by the highest judicial authority, only after the judgment. Their Lordships seem to hold that an application for execution made merely with intent to keep the decree alive and not really to carry on execution cannot save limitation because according to them such an application is not a *bona fide* application for execution. The curious part of the decision is that it ignores decisions that hold to the contrary and purports to rest upon decisions which do not seem to lay down any such rule. Soon after the Act of 1871 was passed in *Rohini Nundun Mitter* v. *Bhugwan Chunder Roy* (2), Markby and Romesh Chunder Mitter, JJ. expressly laid down that absence of *bona fides* is not a ground for disregarding an application under the Act of 1871. This led to the Full Bench decision in *Esham Chunder Bose* v. *Prannath Nag* (3) where the Full Bench upheld the principle laid down in

1. (1923) I L R 45 A 425 (F B) 2. (1874) 22 W R 154.
3. (1874) 22 W R 512 (F B).

Rohini Nundun Mitter v. *Bhugwan Chunder Roy* (2). This view was re-affirmed in *Shurut Chunder Sen* v. *Abdool Khyr Mahomed Mohutesur Billah* (4) and referred to as the law in *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (5). After this the legislature re-enacted the Limitation Act twice and yet no indication is given that these decisions are disapproved of. On the other hand, the language on which the decisions of the Act of 1859 proceeded, "enforce the decree" has been altered into " applying in accordance with law to the proper Court for execution". *Roy Dhunput Singh* v. *Mudhomotee Dabia* (6) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (7) are decisions under the Limitation Act of 1859. *Chattar* v. *Newal Singh* (8) is a case on the construction of the words "in accordance with law" and lays down that an application to the Court to give something which it can under no circumstances give is not an " application in accordance with law". The other cases no doubt refer to *bona fides* but that is not for the purpose of a restrictive interpretation so as to exclude even perfectly good applications but for the purpose of extending the article to cases where the relief asked for is not competent or proper for the Court to grant or the application is defective. The words " in accordance with law" are considered as giving the Court considerable latitude with respect to defective applications. It is here that *bona fides* come in. To interpret the article in the manner the Court has done in this case is to forget that the Limitation Act is an enactment of a restrictive character and should be strictly construed. The Court has no right to interpolate words which are not in the article. All that the Court is entitled to see is whether the conditions prescribed by the article have been satisfied. The conditions are previous application for execution or application to take a step-in-aid of execution in accordance with law or issue of notice. If these conditions are satisfied it has no right to consider whether the application was *bona fide* or not. The Court could not have dismissed the application whether the application was *bona fide* or *mala fide*. It cannot also treat it as *non est*. The issue of notice is one of the starting points. Could the Court introduce question of *bona fides* there? If it could not, for the same reason it could not in the other cases.

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2. (1874) 22 W R 154.
4. (1875) 23 W R 327.
5. (1875) 23 W R 282.
6. (1872) 11 Beng. L R 23 (P C).
7. (1881) I L R 8 C 51.
8. (1889) I L R 12 A 64.

NIRMAN SINGH *v.* LAL RUDRA PRATAP SINGH, I. L. R. 48 All. 529 (P. C.).

This is a somewhat obscure judgment. The facts were : On the death of the father there was some dispute between the sons as to mutation—the eldest claiming to be solely entitled on the ground that the estate was an impartible one, while the others alleged the property to be ordinary partible property in which all were equally entitled. The Extra Assistant Commissioner made an order recording his name as lambardar and that of others as co-sharers. On appeal, the Deputy Commissioner cancelled the entry of the names of the brothers leaving them to claim their share in the estate by proper proceedings. The brothers lived jointly with the eldest brother and latterly were being paid maintenance. The question, under the circumstances, was, whether the brothers could be said to have been excluded. The Sub-Judge held, following the Belgaum case, that the other members could not be held to be excluded. The Judicial Commissioners held the contrary, misconceiving the effect of the order in the mutation proceedings. Their view was that the eldest brother asserted exclusive right and that position having been accepted by the Revenue Officer, further possession of the eldest brother was adverse to the other brothers. Their Lordships point out that the true function of the mutation proceeding is to give possession to some person for fiscal purposes and that it has not the effect of determining any rights *inter se*, and that as a matter of fact also, it left the rights of parties unaffected. The view of the Privy Council apparently is that though the eldest brother asserted an exclusive right, he was put in possession by the Revenue Authority for its own purposes, leaving the rights of parties unaffected and so far as other brothers were concerned, they being in receipt of allowances, they were not excluded and therefore there was no question of limitation. His assertion could not alter the nature of his possession. Some such must be their Lordships' view because their Lordships concede that the brother asserted an exclusive right but point out that the Revenue Authority did not accept his assertion and one fails to see otherwise any explanation of *Raghunath Bali* v. *Maharaj Bali* (1) which would have applied.

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1. (1885) I L R 11 C 777.

JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHAUDHURY, I. L. R. 53 Cal. 590.

The exact point that arose in this case does not seem to have come up for decision before, either in this country or in England. A lease deed for a term of six years provided that the lessee, his heirs or assigns should be entitled to an option for a renewal for similar term of years and so on after each such subsequent lease on certain terms. It is immaterial in this connection to refer to the death of the lessee or the assignment by the lessee's heirs as they make no difference. A covenant for a renewal of lease itself runs with the land and with the reversion. Again an option for perpetual renewal is not unknown to law though Courts will lean against construing a clause as giving a right of perpetual renewal. *Baynham* v. *Guy's Hospital* (1). The lessee in this case continued in possession after the original term of six years as tenant without a renewal being applied for or obtained. He so continued in possession for more than six years and the question was whether he was entitled to the right of renewal under the lease deed after twelve years. The learned Judges have answered it in the negative. It is well settled that in a case where a lessee has an option of renewal, it is open to the landlord to call upon the lessee whether he is willing to exercise his option of a renewal and, in default, to put an end to the lease. *Hersey* v. *Giblett* (2). It is equally settled that the expiry of the original term and the continuance in possession thereafter of the tenant would not by themselves disentitle the option from being exercised by the lessee. *Moss* v. *Barton* (3). If, however, the renewed term would have determined when the relief to the lessee is to be given in a suit he would no longer be entitled to remain in possession under the covenant for renewal. *Jardine Skinner & Co.* v. *Rani Surat Soondari Debi* (4). The present case goes one step further than all these, as, though the first term of renewal would have terminated, the tenant, if he had obtained a renewal of the lease, would have been entitled to a further option of renewal *ad infinitum*. The learned Judges have held that in such a case, he is not entitled to exercise the option any longer, if he did not exercise his option on the previous occasion and obtained a lease thereunder.

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1. (1796) 3 Ves Jr 295: 30 E R 1019 2 (1854) 18 Beav 174: 23 L J Ch 818.
3. (1866) L R 1 Eq. 474. 4. (1878) L R 5 I A 164.

FAKIRGOWDA *v.* VISHNUDAS, I. L. R. 50 Bom. 326.

In this case, the defendant failed to pay the amount of costs under a conditional order that an *ex parte* decree would be set aside if the defendant paid within a time fixed the costs of the plaintiff and the application to set aside the *ex parte* decree was consequently dismissed and the question arose whether this order of rejection was appealable under O. 43, R. 1 (*d*) of the Civil Procedure Code. The learned Judges have answered it in the negative. We are not sure when a conditional order is passed, it may not be open to argument on the one side that it is an order setting aside the *ex parte* decree on the payment of costs and on the other side that it is impliedly an order refusing the application if payment is not made. Cf. *Nannhu Mal* v. *Gulabo* (1). Such a bifurcated order cannot be definitely said to be an order of rejection which is the only order appealable under O. 43, R. 1 (*d*). That is why the Madras High Court in *Venkataswami Naidu* v. *Shanmugam Pillai* (2) and *Rajagopalachari* v. *Narasimha Thathachari* (3) and the Allahabad High Court in *Jagannath Sastri* v. *Kamta Prasad Upadhya* (4) have held that the proper course for the Court under O. 9, R. 13, is to direct the payment of costs or furnishing of security at the first instance and subsequently on the non-compliance of the direction to make an order rejecting the application to set aside the *ex parte* decree. If such a procedure is followed there will be a definite order of rejection which will be clearly appealable. No doubt when such an order is appealed against, the order as to payment of costs, etc., being in the discretion of the first Court would not *ordinarily* be interfered with by the appellate Court. It is needless to point out that a discretion vested in any Court may be interfered with by another tribunal in proper cases. Reference may be made in this connection to the observations of Lord Halsbury on the interference with the discretion vested in other Courts or public bodies in the well-known case of *Sharp* v. *Wakefield* (5). We do not think that anything that has been said by the learned Chief Justice in the case under review can be understood as running counter to those observations.

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1. (1903) I L R 26 A 173. 2. (1917) 6 L W 757.
3. (1925) 88 I C 196. 4. (1913) I L R 36 A 77.
5. (1891) A C 173 at 179-81.

GURUSHANTAPPA *v.* GURUVA, I. L. R. 50 Bom. 339.

The Select Committee on the present Civil Procedure Code reported that S. 99 of the Transfer of Property Act should be repealed altogether and not retained even in its present form as O. 34, R. 14, as it has always been understood even prior to the enactment of S. 99 in the Transfer of Property Act, that under a decree on the personal covenant in a mortgage bond, the entire property and not merely the equity of redemption should be sold in execution, *Khiarajmal* v. *Daim* (1) and no protection was thus needed to the mortgagor against the mortgagee selling the equity of redemption alone keeping the mortgage interest in himself. Some difficulty might arise in cases where the mortgagor had created subsequent incumbrances or sold the equity of redemption. In those cases no protection is needed from the point of view of the mortgagor, but only the mortgagee will suffer if he does not bring a suit under S. 67 of the Transfer of Property Act impleading all the necessary parties as he will then not be able to work out his rights fully. But the legislature has thought fit to retain the provision as we have it in O. 34, R. 14 of the Civil Procedure Code. Even under this rule, one of the necessary requisites for its applicability is that there should be a mortgage or charge prior to the decree itself as pointed out in *Official Receiver, Tanjore* v. *Nagaratna Mudaliar* (2) and *Indramani Dasi* v. *Surendra* (3). If therefore the mortgage or charge comes into existence by the decree itself or subsequent to the decree sought to be executed as in the case under notice O. 34, R. 14 can obviously have no application. In cases where a third person binds himself personally and stands surety for the judgment against another and gives his property as further security, the decree that is executed against the surety is under S. 145 of the Code really the one passed originally against the judgment-debtor and not a fresh one after the giving of the surety bond. This is really stating the ground of decision of the learned Judges in the present case in another form. The *ratio decidendi* of *Amir* v. *Mahadeo Prasad* (4) is with all respect irreconcilable with that of *Mukta Prasad* v. *Mahadeo Prasad* (5), but the former decision can be supported on the ground that the interest of the surety in the properties given as securities became vested

1. (1904) I L R 32 C 296· 32 I A 23. 2. (1925) 49 M L J 643.
3. (1921) 35 C L J 61. 4. (1916) I L R 39 A 225.
5. (1916) I L R 38 A 327.

in other persons and there can therefore be no effective remedy against the properties without a suit under S. 67 of the Transfer of Property Act against the various owners of the equity of redemption. If, in the present case, the property given as security were subsequently sold to a third person, the procedure under S. 145 would obviously not entitle the decree-holder to sell the property in the hands of the third person and he would necessarily have to sue on the charge or mortgage in the proper form. The exact question that arose in this case did not come up for consideration in *Official Receiver, Tanjore* v. *Nagaratna Mudaliar* (2) as the other person whose property was given as security was the son of the judgment-debtor whose property could have been proceeded against in execution of the original decree itself and the learned Judges therefore leave the present question open. The Patna High Court has taken the same view in *Babu Ganga Deo Narain* v. *Joti Lal Sahu* (6) and *Madho Prasad* v. *Chandrabati Kuer* (7). We would in this connection only refer, in addition to the case in *Musammat Chandrabati* v. *Madho Prosad* (8) and submit that the view taken therein is not inconsistent with the decision under notice.

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2. (1925) 49 M L J 643. 6. (1917) 2 P L J 197.
7. (1917) 38 I C 130. 8. (1914) 19 C W N 178.

MASIT-ULLAH *v.* DAMODAR PRASAD, I. L. R. 48 All. 518 (P. C.).

In this case, their Lordships reject the distinction made between the liability of the son, grandson and great-grandson in respect of the obligation to pay the ancestor's debts from joint family or ancestral estate. Their Lordships hold that the right by birth and the obligation to pay are co-extensive and the distinction is good only if the Hindu law liability is sought to be enforced independently of the possession of ancestral assets which cannot of course be done in British Indian Courts now.

In this case, the sale was for Rs. 18,400 and in the view taken by the Privy Council, the consideration to the extent of Rs. 16,000 was for the discharge of binding debts. The balance of Rs. 2,000 remained unaccounted for though the amount was shown to have been paid to the father. On the finding that the son was living with the father and the suit was collusive one and the father's evidence which would have been material had been withheld and a substantial portion of the consideration had been found binding, their Lordships dismissed the suit of the son wholly. The Sub-Court on the same view released a share of the property proportioned to the part of the consideration found not binding. This, their Lordships say, was unworkable, agreeing with the High Court in this matter; whether they also mean incompetent is more than one can say.

RAMIAH *v.* VENKATASUBBAMMA, (1925) I. L. R. 49 Mad. 261 : 50 M. L. J. 308 (F. B.).

It is S. 187 of the Succession Act which provides that no right as executor or legatee can be relinquished unless a Court of competent jurisdiction shall have granted a probate of the will under which the right is claimed, " that compels the executor in the case of wills coming under that Act to take out probate. For even in those cases it is not the probate that confers the power on the executor to deal with the estate but the will [*Meyappa Chetty* v. *Subrahmanya* (1)] and the vesting section 188 makes no reference to the grant of probate. In the Probate and Administration Act there is no section corresponding to S. 187 but there is the section corresponding to S. 188 without any reference again to the grant of probate. S. 12 no doubt is worded as if the grant of probate validates inter-

1. (1916) A C 603.

mediate acts of the executor as such but then it is not to be forgotten that the Act applies to some wills where the taking out of probate is compulsory. That would seem to be sufficient explanation for the wording and there is this undoubted fact that there are numerous sections of the Act that must be applicable to wills whether probate is taken out or not. *See* Chapter XI. There are further, as pointed out by Mr. Justice Kumaraswami Sastri, J., certain practical difficulties in holding that the provisions of the Act apply only to executors who have taken out probate with reference to the acts done by them if their validity is to be made dependent upon the accident of their taking out probate. On the whole we think the view of the Full Bench that the provisions of the Act apply to executors who have not taken out probate as well as those who have, excepting of course those sections that professedly deal with executors who have taken out probate, is the view, most consistent with both principle and convenience.

VENKATESAM CHETTY *v.* GULAB CHAND, (1925) I. L. R. 49 Mad. 291 : 50 M. L. J. 190 (F. B.).

After the judgment of the Privy Council in *Sabitri Thakurain* v. *Savi* (1) the point was unarguable that O. 41, R. 22 would not apply to Original Side appeals.

SANJEEVA REDDI *v.* KONERI REDDI, (1925) I. L. R. 49 Mad. 315 : 50 M. L. J. 460.

This is a somewhat interesting case. The defendant was sued for damages for making certain defamatory statements, first in an application to the Magistrate to take security proceedings ; secondly, before the Police Officer to whom the matter was referred for investigation. The question was whether the statements were absolutely privileged. The first being to a Court to initiate a judicial proceeding for the protection of the defendant, there was little difficulty in holding that it was privileged. For the second, there was more difficulty in that the privilege conferred by S. 161 did not apply, for it was not an investigation contemplated by that section. Their Lordships hold that the privilege applies on the analogy of statements by witness to parties, their agents or their solicitors as a preliminary to their examination in Court which have been held privileged by the House of Lords in *Watson* v. *McEvan* (2).

1. (1921) I L R 48 C 481: 40 M L J 508 (P C).
2. (1905) A C 480.

CHIDAMBARA THEVAR *v.* SUBBARAYAR, (1925) I. L. R. 49 Mad. 508 : 51 M. L. J. 139.

Is a mortgage decree a decree for the payment of money? It might undoubtedly become one, if there is a personal covenant, when the security is exhausted and a balance remains due. So long as that stage is not reached, there is no decree for payment of money. The same view is taken, we see, in *Rajarathna Naidu* v. *Ramachandra Naidu* (1). O. 21, R. 36 contemplates the enforcement of a decree for payment of money by arrest. It might look somewhat strange that though there is a prohibition against execution by a judgment-debtor when money decree is transferred to him, if a mortgage decree is assigned to a judgment-debtor he should be in a position to obtain a decree under O. 34, R. 6 which he may execute against the others. But this does not necessarily follow. The prohibition of the section might not apply but there is nothing to prevent the Court from considering the question whether by reason of the transfer, the decree has ceased under the general law to be executable in whole or in part, or whether by reason of such a transfer the money has ceased to be "legally recoverable" from others within the meaning of O. 34, R. 6. Even in the case of the mortgage decree, if the assignment is in favour of the person primarily liable there is nothing to prevent the Court from holding that the decree should not be executable by him. The prohibition under O. 21, R. 16 is an absolute one and has no regard to the special circumstances of the case. It makes no distinction between judgment-debtors primarily liable and secondarily liable, between execution for the aliquot share of the decree for which the other judgment-debtors are liable and execution for the full amount. All these distinctions are available for consideration by the Court when the objection is taken under the general law.

VENKATASUBBA MUDALI *v.* MANICKAMMAL, (1925) I. L. R. 49 Mad. 513 : 50 M. L. J. 364.

It is one thing to say that an agreement prior to decree that a decree should be passed but when passed should either not be executed against the contractee or not be executed for some time should not be permitted to be pleaded at all being

1. (1924) I L R 47 M 948 : 47 M L J 434.

inconsistent with the decree. That is the view which has commended itself to the Rangoon High Court. It is quite another thing and to us is wholly unintelligible why or how on principle any distinction could be made between an agreement not to execute the decree and an agreement not to execute for a time. The decree as it stands is executable and an agreement not to execute it for a time contradicts it quite as much as a decree not to execute at all. We do not believe that even those Courts that hold that such an agreement is pleadable in execution would allow it to be pleaded if it could have been pleaded as a defence to the suit itself. Such a thing as a contract not to sue as distinguished from a release is well known and a man might well agree to have a decree passed and at the same time might enter into a contract that the decree should not be executed. If the arrangement is with a view to commit fraud on a third party, there might be difficulty in enforcing such an agreement but where no fraud is intended and the arrangement is merely to protect the party entering into the contract without at the same time effecting a settlement of the claim there is no reason why it should not be enforced. Such a thing will ordinarily happen when there are others jointly bound. Such an arrangement would be quite good under the English Law as a contract not to sue out execution against one without at the same time releasing the claim altogether.

SATYANARAYANA *v.* CHINNA VENKATRAO, (1925) I. L. R. 49 Mad. 302 : 50 M. L. J. 674.

We quite agree that when the vendee under an agreement of sale comes into Court and says that he had a sale deed executed by the defendant in his favour which he could have got registered under the provisions of the Registration Act, it is not open to him to ask the Court to direct the defendant to execute another document and register it. The defendant never stipulated for it and the plaintiff could not therefore insist upon it. If the defendant did not take any of the steps which he ought to have, the plaintiff had his remedy under the Act, and if he failed to avail himself he has no other remedy. If, for no fault of the plaintiff, the remedy under the Act is not available to him, either because the document has been fraudulently withheld by the defendant or is destroyed owing to no negligence of the plaintiff, he may have his remedy of specific performance. In this case what happened was apparently that the document was not registered because the defendant denied execution. Is it not open to the plaintiff to take the defendant at his word and ask him to execute a proper conveyance ? If the plaintiff persisted in saying that the conveyance is good, he is on his own showing out of Court but if he did not and relied upon the word of the defendant, is there anything to prevent the Court from giving him the relief ? We think not.

HARIDAS NARAYANDAS *v.* DEVKUVARBAI, I. L. R. 50 Bom. 443.

This is a decision of considerable interest on Hindu joint family law and shows that an ancestral nucleus of property is not essential before the earnings of joint family members can become joint family properties. A Hindu father with no ancestral nucleus of property started business and made some fortune. A son was afterwards born to him and the father and the son having common mess and worship, did business together and earned considerable properties thereby. The first question was whether under these conditions the properties earned were the joint family properties of the family composed of the father and the son with all their incidents or were properties held by them in joint tenancy or tenancy-in-common. The learned Judges held that in such circumstances the properties were owned by them as joint family properties with the right survivorship and right by birth in

persons that might be subsequently born in the family. Although the contrary was held in *Chatturbhooj Meghji* v. *Dharamsi Naranji and Harjivan Dharamsi* (1) and adopted by Mayne in the earlier editions of his work on Hindu Law, it was held by the Privy Council as early as *Ram Pershad Tewarry* v. *Doss and others* (2) and by the Madras High Court in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3), *Gopalaswami Chetti* v. *Arunachalam Chetti* (4), that under these circumstances the properties earned would be joint family properties. To have this effect, however, it was pointed out by Bhashyam Aiyangar, J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3) that all the then members should have joined in the business and that if only some of the members of the family earned by their exertions without joining the others in the business, the properties so acquired would not be joint family properties but would be the joint properties of the acquirers alone in which their sons would get no interest by birth. We do not believe that the doubts that may have been cast on some other observations of the judgment of the learned Judge by some of the later pronouncements of the Privy Council, have any bearing on this part of his judgment.

Coming to the second point dealt with by the learned Judges, *i. e.*, as to the validity of a gift to a daughter by a father and manager of a joint Hindu family of immoveable properties of the family to a reasonable extent, not having been made on the occasion of marriage or other auspicious ceremonies, the Madras High Court has uniformly upheld such gifts—not merely such gifts, but gifts of family immoveable properties to a sister by a brother and also gifts made to a son-in-law. Notwithstanding the attempts made in *Sundararamayya* v. *Sitamma* (5) and *Ramaswami Aiyar* v. *Vengiduswami Aiyar* (6) to support them by reference to Hindu Law texts, it is not clear whether they have really anything more than the enlightened consciousness of the community to support them, because the passages of Mitakshara, Ch. I, S. 1, verses 27 to 29 and Ch. I, S. 7, verses 6 to 14 are not clearly in favour of gifts of family immoveable properties by a father; and even allotments by brothers of the one-fourth share to unmarried sisters are now obsolete. Reference may in this connection be usefully made

1. (1884) I L R 9 B 438.
2. (1866) 10 M I A 490 (506).
3. (1901) I L R 25 M 149: 11 M L J 353.
4. (1903) I L R 27 M 32.
5. (1911) I L R 35 M 628: 21 M L J 695.
6. (1898) I L R 22 M 113: 8 M L J 170.

to the arguments reported in *Anivillah Sundararamayya* v. *Cherla Seethamma* (7). Again such gifts to other female members have not been countenanced even in Madras. See *Movva Subbarao* v. *Movva Ademma* (8). Although it may be difficult to find authority for the validity of such gifts in the texts of Hindu Law, after the pronouncement of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi* (9) affirming *Narayana* v. *Ramalinga* (10) their validity need not have been left in doubt by the Bombay High Court in the case under notice and upheld on the narrow ground of the son's acquiescence in the gift by the father.

MALLAPPA VENKATESH *v.* JANARDAN, I. L. R. 50 Bom. 450.

In this case the learned Judges have held that in the case of leases with a covenant for forfeiture and a condition of re-entry by the landlord, in the event of assignment or parting with possession of the leased properties by the tenant, the Courts have power in equity to relieve the tenant against forfeiture, although no case of fraud, surprise, accident or mistake was set up by the tenant as having led to the breach of the covenant. It does not appear from the report whether the decisions of the English Courts were cited before the Court ; and we venture to think that if the attention of the learned Judges have been drawn to the relevant authorities on the question, they would have come to the opposite conclusion. In the Courts of Common Law, though they leaned against forfeiture, a covenant in a lease for forfeiture and a condition for re-entry were always enforced, when a breach of the covenant was strictly proved. But from very early times Courts of Equity relieved against forfeiture in cases of covenants for forfeiture and re-entry for non-payment of rent. This we find in S. 114 of the Transfer of Property Act which applies to cases of leases governed by the Act. To cases exempted from the Act, the rule of equity so well recognised in England would be applied relieving tenants in cases of forfeiture for non-payment of rent. In other cases of forfeiture, as for instance under covenants not to alienate or part with possession or for repairs, Courts of Equity

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7. (1911) 21 M L J 695. 8. (1924) 47 M L J 465.
9. (1922) I L R 45 M 489: 43 M L J 482 (P C). 10. (1915) I L R 39 M 587.

have held that they have no power to relieve the tenant from forfeiture, except when the breach of covenant was occasioned by fraud, accident or surprise or by mistake as understood by that term in the equitable doctrine. This was clearly laid down by Lord Eldon in *Hill* v. *Barclay* (1). There are also direct authorities on the question dealing with a covenant for forfeiture and a condition for re-entry in cases of assignment by the lessee or his parting with possession. See *Wafer* v. *Mocato* (2), *Hill* v. *Barclay* (1) and *Barrow* v. *Isaacs and Sons* (3). The result of the English decisions in equity may be shortly stated that in cases of wilful breaches of covenant, equity will not relieve against forfeiture. There are, however, statutory provisions in the Settled Land Act and other enactments restricting forfeiture for breach of covenant by lessee in certain instances and under conditions imposed thereby. But they have no application to this country. It may also be noticed in this connection that a covenant or condition against the assigning, under-letting, parting with the possession or disposing of the land leased, is expressly exempted from the operation of the Settled Land Act by sub-section 6 (1) of S. 14 of the Act, with the result that in these cases the rule in England still is that except in cases of surprise, fraud or accident, there can be no relief against forfeiture.

[END OF VOLUME LI.]

1. (1810) 18 Ves 56. 2. (1724) 9 Mod 112. 3. (1891) 1 Q B 417.

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NOTES OF RECENT CASES.

Ramesam, J.
28th April, 1926. } S. A. No. 483 of 1923.

Malabar Law—Property acquired by junior member—Presumption —Junior member becoming a karnavan and executing a will —If property tarwad property.

Where one Theyyan Menon, a junior member of a *tarwad*, acquired some *kanom* property in his own name which was after his death renewed by his brother Krishna Menon in 1882 and subsequently Krishna Menon was in enjoyment of the property and he became *karnavan* in 1911, but before that, he executed a will bequeathing the property to his wife and children :

Held, there is no presumption that the property was *tarwad* property especially when it was shown that the junior member had private funds out of which he could have acquired the property. 23 L. W. 575 followed.

K. P. Ramakrishna Aiyar for Appellant.

K. Krishna Menon for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
30th April, 1926. } A. S. No. 102 of 1923.

Motor Vehicles Act—License under—Cancellation by District Magistrate—Illegal cancellation—Suit for damages against Secretary of State—If lies—Costs—Rule as to.

A suit for damages against the Secretary of State for India in Council does not lie for the cancellation by the District Magistrate of a license issued by him under the Indian Motor Vehicles Act and the rules framed thereunder for the plying of motor vehicles for hire, though such cancellation is illegal and opposed to the terms and conditions of the license. The District Magistrate did not act either as a servant or

an agent of the Government as he acted under the powers conferred upon him by Statute. 28 B. 314 and 39 M. 781 followed.

Tobin v. *Queen*, 33 L. J. Common Pleas 189 referred. 7 M. 466 (F. B.) doubted. 28 M. 213, 40 C. 452 distinguished.

Where no cause of action is disclosed against the Secretary of State for India in Council, he should not be deprived of his costs merely on the ground that the action of the District Magistrate in cancelling the license cannot be justified.

The Government Pleader for Appellant.

K. Kameswara Rao for Respondent.

T. S. V.

Spencer, J. *30th April*, 1926.	C. R. P. No. 619 of 1925.

Civil Procedure Code, O. 39, R. 2—Granting of temporary injunction—Conditions imposed—Order for maintenance if can be granted.

In a suit for possession of certain properties the plaintiff applied for a temporary injunction and the Court granted the same but imposed certain conditions, one of them being, granting an order for maintenance to one of the defendants.

Held, that the words '*or otherwise*' in Rule 2 (2) of Order 39 are wide enough to include such an order and it need not be construed as *ejusdem generis* with the previous words as the order for maintenance is granted in lieu of the right of enjoyment of the property.

K. P. Ramakrishna Aiyar for Petitioner.

S. Srinivasa Aiyar for Respondent.

T. S. V.

Krishnan, J. *30th April*, 1926.	C. R. P. No. 604 of 1924.

Master and servant—Wrongful dismissal—Suit for damages—Shortage of goods entrusted—When proof of negligence—Clause empowering master to dismiss for any reason—Construction.

In a suit for damages for wrongful dismissal by a store-keeper against a Co-operative Society, an unexplained shortage of the goods entrusted to the plaintiff by the Society is not by itself proof of negligence on his part unless he is shown to have been given sole and exclusive custody of the goods. A clause in the agreement of service giving the master power to remove the servant for any reason which is in his opinion sufficient, does not justify dismissal without any reason proved to the satisfaction of the Court.

S. T. Srinivasagopalachari for Petitioner.

A. Sundaram Aiyar for Respondent.

T. S. V.

Phillips and Odgers, JJ.
30th April, 1926. } C. M. P. No. 1517 of 1926.

Civil Procedure Code, Ss. 109, 110—Decree for more than Rs. 10,000—Appeal and memorandum of objections—Appeal dismissed and memorandum of objections allowed to a slight extent—Decree if one of affirmance or variation—Appeal.

A decree passed against a defendant for a sum of more than Rs. 10,000 was appealed against by him and the plaintiff also filed a memorandum of objections. The appeal was dismissed, and the memorandum of objections allowed to the extent of a few hundred rupees, and one decree was drafted in the High Court embodying the result of the appeal and the cross-appeal. The defendant applied for leave to appeal to His Majesty in Council. *Held*, the dismissal of the appeal amounted to only an affirmation of the decree of the Court below and the incorporation in one decree of the result of allowing the memorandum of objections did not make it anything else than a decree of affirmance. 51 Cal. 969 (P. C.) ; 8 C. W. N. 294 referred to.

A.V. Viswanatha Sastri for *C. Padmanabha Aiyangar* for Petitioner.

K. V. Krishnaswami Aiyar and *T. M. Krishnaswami Aiyar* for Respondents.

T. S. V.

Devadoss, J.
3rd May, 1926. } S. A. No. 1499 of 1923.

Arbitration—Mediator settling a dispute but one of the parties failing to act accordingly—Whether mediator liable as on a contract.

Where the defendant acted as a mediator between the plaintiff and a third person regarding a dispute about an elephant and settled that the plaintiff should get back the elephant on his paying Rs. 750 into the hands of the mediator to be paid to the 3rd defendant and both parties accepted the same but the third person failed to deliver the elephant after getting the money, *held*, the mediator cannot be held liable for the loss incurred by the plaintiff as there was no consideration for his acting as mediator and the mediator cannot be held to be a bailee either for the money or for the elephant.

K. Krishna Menon for Appellant.

K. V. Krishnaswami Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.

T. S. V.

Kumaraswami Sastri, J.
4th May, 1926. } T. O. S. No. 11 of 1925.

Will—Undue influence—Invalidating—What amounts to.

When a will is executed by a testator while in extreme sickness, disinheriting persons who ought to form the object of his natural bounty, and bequeathing the bulk of the properties in favour of persons who

attended on him during his sickness, and when the circumstances show that the testator was kept under their undue influence and under the wrong impression that he was neglected by all others, *held*, the Court is entitled to set aside that will. 102 E.R. 410, 1 P. & D. 482, 164 E. R. 1093 followed. 11 P. D. 81 distinguished,

K. V. Ramachandra Aiyar for Plaintiff (Executor).

P. G. Krishna Aiyar for Defendant.

T. S. V.

Spencer and Ramesam, JJ. *5th May*, 1926. } A. S. No. 164 of 1923.

Will—Legatee—Suit for recovery of property—Agreement by legatee to take money and sell property to defendant—Execution of sale deed contemplated—If admissible in evidence—Payment and acceptance of consideration—Part performance—Effect of.

In a suit by a legatee for recovery of specific immoveable property, the defendants relied upon an unregistered agreement by which the legatee took some money and agreed to sell the same to the defendants. The agreement contemplated the formal execution of a deed of conveyance. It also contained a clause to the effect that the legatee relinquished all her rights in the property bequeathed. *Held*, that the document which purported to be only an agreement and contemplated the execution of another document is admissible in evidence. 37 Mad. 480; 21 I. C. 777; 46 Mad. 373 at 380 followed.

Though the sale deed contemplated was not executed, the part performance of the agreement by payment and acceptance of the consideration is certainly a defence to the claim of the plaintiff. 46 Mad. 919 (F. B.) followed.

T. Rangachariar, K. Kameswara Rao, A. Lakshmayya for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ. *6th May*, 1926. } C. M. A. No. 129 of 1925.

Civil Procedure Code, S. 11, Explanation IV—Claim in the alternative—Omission to make—When bars subsequent suit.

A suit for the recovery of a specific plot of land on the basis of possession and dispossession was dismissed on the ground that the plaintiff had no title to any specific land, he having purchased only an undivided one acre out of a large area. In a subsequent suit by him for partition and recovery of his one acre, *held*, the causes of action for the two suits being different and dissimilar, they could not be clubbed together even in the alternative in one and the same suit and hence the second suit for partition was not barred by *res judicata*. 46 Mad. 135 distd.

C. A. Seshagiri Sastri for Appellant.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Respondent.

T. S. V.

Spencer and Ramesam, JJ. *4th May,* 1926. } A. S. No. 352 of 1922.

Transfer of Property Act, S. 59—Karar—*Deposit of title deeds as security—Registration—Schedule of properties added subsequent to execution—Attestation—Absence of—Effect—Registration Act, Ss.* 21 *and* 22.

A person executed a registered *karar* under which he deposited the title deeds of his immoveable properties as security for the performance of a contract to supply timber and also recited therein that there was a charge over the same for the advance money paid. The *karar* contained a full description of the properties and was signed by the executants and two attestors. But before the document could be registered, a schedule of the properties was added at the instance of the Registration Officer and this was signed only by the executants but was not attested. In a suit filed on the basis of the registered *karar* treated as a mortgage, *held*, (1) the want of attestation after the schedule of properties did not affect the validity of the deed. 43 Mad. 405 followed; and (2) an omission to give a schedule of properties cannot affect the validity of the registration under Ss. 21 and 22 of the Registration Act provided the properties could be clearly identified or the giving of a Schedule is made compulsory by a notification of the Government.

C. V. Anantakrishna Aiyar and *K. Krishna Menon* for Appellant.

T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar* for Respondents.

T. S. V.

Krishnan and Venkatasubba Rao, JJ. *6th May,* 1926. } O. S. A. No. 19 of 1925.

Contract—Third party—Right of suit.

A person who is not a party to a contract cannot ordinarily take advantage of or enforce the contract. *Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393 followed.

On a sale of assets by a person with a direction to the vendee to pay a portion of the price to a creditor of the vendor, the creditor has no right of suit against the vendee. There is no trust created in favour of the creditor and the case does not come within any of the recognised exceptions to the general rule enunciated above.

G. Krishnaswami Aiyar and *K. Subramaniam* for Appellant.

K. S. Krishnaswami Aiyangar and *P. S. Ramaswami Aiyangar* for Respondents.

T. S. V.

Devadoss and Waller, JJ. *6th May,* 1926. } C. M. P. No. 379 of 1926.

Civil Procedure Code, S. 109—*Order of District Judge granting probate of will—Reversal by High Court—Leave to appeal to Privy Council—Grant of—Letters Patent (Madras), cl.* 39.

N R C

An appeal lies to the Privy Council against an order of a Division Bench of the High Court reversing an order of a District Judge granting probate of a will under the Probate and Administration Act. The absence of any provision in the Probate Act providing for such an appeal does not have the effect of taking away the right of appeal given by S. 109, Civil Procedure Code, and cl. 39 of the Letters Patent. o Cal. 21 distd. ; 40 Cal. 685 ; 45 Mad. 320 ; 51 I. C. 506 refd. to.

S. Varadachari and *N. S. Rangasami Aiyangar* for Petitioner.

M. Patanjali Sastri and *A. Sundaram Aiyar* for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ. *6th May*, 1926. — L. P. A. No. 64 of 1925.

Contract—Non-delivery of goods—Suit for damages—Wagons not available and goods not consigned—Discharge of contract—Impossibility of performance.

According to the terms of a contract, goods were to be sent by the seller to the purchaser by rail. Owing to certain war restrictions, no railway wagons were available and hence the goods could not be despatched. In a suit for damages by the vendee for non-delivery of goods contracted to be sent by rail, *held*, it was an implied term of the contract within the knowledge of both the parties that performance was dependant on wagons being available, and if, for no fault of the vendor such wagons could not be secured, the contract became impossible of performance and was discharged, and hence the suit for damages could not be sustained. (1917) 1 K. B. 222 ; (1917) 2 K. B. 678 ; 6 A. C. 38 at 59 ; (1919) A. C. 435 at 459 ; 24 C. W. N. 703 ; 49 Mad. 200 referred to.

T.M. Krishnaswami Aiyar and *W. Kothandaramiah* for Appellant.

K.V. Krishnaswami Aiyar, Krishna Arya and *Viraraghavalu* for Respondent.

T. S. V.

Chief Justice, Ramesam and Beasley, JJ. *7th May*, 1926. — A. S. No. 202 of 1923.

Contract—Advance paid—Breach of contract—Suit to recover money advanced—Interest on advance—If can be awarded.

Where money has been advanced towards a contract for the supply of goods, but the contract was not performed and a suit is filed for recovering the money advanced, *held by a majority of the Full Bench* (*Ramesam, J. contra*) the plaintiff is not entitled to claim interest on the advance, when the contract did not provide for it and no demand was made prior to suit.

Per Ramesam, J.—The law in India is different from that in England and the plaintiff is entitled to interest besides any other item of damages to which he is entitled. Case-law, English and Indian, discussed.

Per the Chief Justice.—Where the plaintiff elects only to sue for the return of the deposit by giving up his claim for damages, he cannot

recover interest on the advance. Scope of Illustration (*r*) to S. 73 of the Contract Act and Lord Tenterdon's Act on which the Indian Interest Act is based, discussed.

N. Chandrasekhara Aiyar for Appellant.

S. Varadachari and *K. V. Sesha Aiyangar* for Respondent.

T. S. V.

Kumaraswami Sastri, Offg. C. J. and Curgenven, J. — O. S. A. No. 26 of 1925.
20th July, 1926.

Partnership—New partner—Agreement inter se *to be liable for old debts—Creditor if can sue new partner—Privity of contract.*

A person became a partner of an existing firm and he agreed with the partners to be liable for all partnership debts even if they had been incurred prior to his entering the partnership. A creditor to whom moneys were owing by the firm prior to the coming in of the new partner sought to make him liable for the partnership debt. *Held*, the agreement being only between the partners *inter se*, in the absence of a separate agreement, express or implied, with him, the creditor could not make him liable. L. R. 1 P. C. 27 followed; 40 Cal. 814 referred to.

Nugent Grant and *K. S. Krishnasami Aiyangar* for Appellant.

V. Radhakrishnayya and *K. Sanjiva Kamath* for Respondent.

T. S. V.

Devadoss, J. — S. A. No. 1434 of 1923.
26th July, 1926.

Madras Estates Land Act, Ss. 53, 112, 126*—Sale of holding—Exchange of* patta *and* muchilika*—If necessary—What portion of holding to be sold.*

In order to entitle a landholder to proceed under S. 112 of the Estates Land Act and sell the ryot's holding for arrears of rent, it is not necessary that there should be an exchange of *patta* and *muchilika* for that *fasli*; it is enough if a valid *patta* continues in force during that *fasli* under S. 53 of the Act.

Though under S. 126, the extent of the holding to be brought to sale is to be as nearly as possible equal in value to the amount of arrears due, the minimum extent to be brought to sale is fixed by S. 120 to be a Revenue field which has been defined in S. 3 (12). A sale of a Revenue field though its value may be disproportionate to the amount of arrears due is not invalid.

K. S. Ramabhadra Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

T. S. V.

Devadoss, J. — S. A. No. 1372 of 1923.
26th July, 1926.

Lessor and lessee—Lease deed—Acceptance of—Evidence—Municipal registers and survey plans—Value of.

A lease deed executed by a lessee must be proved to have been accepted by the lessor and that the latter had full knowledge of its contents before it can be used in evidence against him.

Documents not *inter partes* relating to immoveable property are admissible in evidence only if they form the documents of title of one of the parties to the suit.

Municipal registers and survey plans are only a piece of evidence as to the state of things that existed at the time, but are not conclusive on the question of title or possession of the properties dealt with.

S. R. Muthusami Aiyar for Appellant.

K. V. Srinivasan for Respondent.

T. S. V.

Devadoss, J.
27th July, 1926. } S. A. No. 1574 of 1923.

Co-tenants—Ouster—Inference of—Interference in second appeal.

A Christian died leaving a son and two daughters. The son alone was enjoying the properties and alienated them as if they were his own. The daughters sued for a partition more than 20 years after they attained majority. *Held*, under the circumstances, a Court of fact is entitled to infer an ouster by the son. Where a Court of fact draws a presumption of ouster, it is not open to attack in second appeal. (1912) A. C. 230; 11 Ad. and E. 1008; 1 Cowp. 217; 43 Mad. 244 (P. C.) referred to.

The consciousness on the part of one of several co-tenants that he had no right to a share at all, coupled with an intention on the part of the other co-tenant to treat the property as his absolutely is a material circumstance from which a Court can infer ouster.

C. V. Anantakrishna Aiyar and *T. R. Subramania Aiyar* for Appellants.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondents.

T. S. V.

Jackson, J.
27th July, 1926. } C. M. S. A. No. 3 of 1925.

Civil Procedure Code, S. 47—Appeal—Order in execution—Petitioner if a representative of decree-holder.

An appeal lies against an order passed in execution holding that the petitioner is or is not the representative of the decree-holder. 25 Mad. 545 followed.

W. S. Subramania Aiyar for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V.

Jackson, J.
26th July, 1926.
C. R. P. No. 188 of 1925.

Civil Procedure Code, Ss. 148 *and* 151—*Power of Court to extend time—Suit on promissory note—Time given for succession certificate—If can be extended—Procedure.*

In a suit on a promissory note executed in favour of the plaintiff's deceased mother, the Court passed a decree but added the following: "Time for succession certificate two months, The suit shall stand dismissed in default." Before the expiry of the period of two months, the plaintiff applied under Ss. 148 and 151, Civil Procedure Code, for extension of time for filing the succession certificate and the Court treating the decree as a preliminary decree extended the time. *Held*, the decree passed was a final decree and the Court had no jurisdiction to extend time under Ss. 148 and 151, Civil Procedure Code, though it might have done so treating it as an application for review.

K. Ramamurthi and *A. Ramaswami Aiyangar* for Petitioner.

T. K. Srinivasatatachari for Respondent.

T. S. V.

Jackson, J.
28th July, 1926.
C. R. P. No. 469 of 1926.

Madras District Municipalities Act—Rules for the conduct of elections, R 4. (2)—*Scope of—Two candidates standing for election—Equality of votes—Lots if can be cast—Election petition—Judge if can take a new point* suo motu—*Procedure.*

At a meeting of a Municipal Council held for the election of Chairman, there were only two candidates and both secured an equal number of votes. Thereupon the presiding officer cast lots and declared one of them to be the elected Chairman. The defeated candidate challenged the validity of the election by means of an election petition, and during the trial of the petition the Subordinate Judge *suo motu* raised a new point, *i.e.*, that where the candidates are only two in number and there is an equality of votes, the rules did not provide for the casting of lots and on that ground set aside the election. *Held*, in revision, that it was not open to the Judge to decide the election petition on grounds which were not contained in the election petition.

Semble: A reasonable interpretation of R. 4 (2) of the Rules framed by the Government would make it applicable not only to cases where there are more than two candidates to start with, but also to a case where there are only two candidates and if there is an equality of votes, the proper procedure is to cast lots.

T. R. Ramachandra Aiyar for Petitioner.

T. M. Krishnaswami Aiyar, K. Rajah Aiyar, P. N. Appusami Aiyar and *V. Ramaswami Aiyar* for Respondents.

T. S. V.

Odgers, J.
29th July, 1926.
S. A. No. 239 of 1925.

Hindu Law—Widow—Alienation—Justifying purposes—Provision for funeral expenses of mother-in-law.

N I C

One of the items of consideration for a Hindu widow's alienation was an anticipatory provision for the funeral expenses of her mother-in-law who was alive at that time. *Held,* it was not an unreasonable use of the estate by the widow and could also be justified as tending to the spiritual welfare of her husband. 4 Pat. L J. 434 ; (1911) 1 M. W. N. 268 distd, ; (1912) M. W. N. 136 dissented from.

It is not an inflexible rule of Hindu Law that a widow cannot alienate property for future expenses. 50 M. L. J. 234 and 2 Lah. 357 refd. to.

K. S. Sankara Aiyar and *T. V. Ramamurthi* for Appellants.

B. V. Viswanatha Aiyar for Respondents.

T. S. V.

Devadoss, J.

30th July, 1926. } S. A. No. 1774 of 1923.

Madras Estates Land Act, S. 3 (5)—*Estate—Minor inam—Grant of both warams of a portion of village—Whether an estate—Whether a tenant of the grantee becomes an occupancy ryot under the Act.*

A post-settlement grant by a Zemindar to a temple of a portion of a village constitutes the *inam* an estate. It makes no difference that the Zemindar granted both warams, reserved no quit-rent or jodi, and put the temple in physical possession of the lands, the ryots on the lands having relinquished them to the Zemindar before the grant. The tenants of the temple in 19 9 have rights of occupancy under the Madras Estates Land Act. 45 Mad. 716 (F. B.) applied.

K. N. Rajagopala Sastri for Appellant.

B. Somayya for Respondent.

T. S. V.

Odgers, J.

2nd August, 1926. } S. A. No. 926 of 1923.

Limitation Act, Art. 144—*Hindu co-parcener—Alienation by—Plea of adverse possession—Exclusion or ouster—Knowledge—Proof of—Guardian of minor—Alienation—If binds family.*

An alienee from a Hindu co-parcener who claims title by adverse possession as again t the other co-parceners has to prove exclusion or ouster to their knowledge as under Art. 127 of the Limitation Act. S. A. No. 2019 of 1920 ; 25 L C. 573 followed ; 11 L. W. 31 not followed.

A co-parcener who is in possession of the share of a Mahomedan convert is deemed to be in possession on behalf of the other members of the family.

A guardian of a minor has no power to represent the joint family of which his ward is a member and any alienation by him will not bind the other members of the family.

K. V. Krishnaswami Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 716 of 1923.

Will—Construction—Defeasance clause—Intention of testator—Indian Succession Act, S. 111.

A testator aged 67 and in feeble health executed a will in Tamil in the mofussil, under which after providing that his widow and another lady should enjoy the income of all his properties during their lifetime, he directed that his properties should thereafter be taken in equal shares by three legatees *A*, *B* and *C* with absolute powers of alienation and also that of *A* and *B* (who were father and son respectively) if either should die the survivor should take the share of the deceased. *A* survived the testator but predeceased his widow. In a suit for sale by a mortgagee from *A* of his one-third share, *B* contended that there was nothing to sell as the defeasance clause had come into operation. *Held*, the will was not governed by S. 111 of the Indian Succession Act and having regard to the intention of the testator as gathered from the various provisions of the will, the reference to death in the defeasance clause was not confined to death during the testator's lifetime and, under the circumstances that happened, the mortgagee could not succeed. Case-law discussed. 39 Bom. 296 (P. C.) applied ; (1874) L. R. 7 H. L. 388 refd. to.

The Advocate-General and *V. Krishnamachari* for Appellant.

S. T. Srinivasagopalachari for Respondent.

T. S. V.

Odgers, J.
2nd August, 1926. } S. A. No. 136 of 1926.

Arbitration—One arbitrator to select colleagues—The latter if arbitrators or assessors—Majority award—Validity of—Appeal—Review of decree pending appeal—Effect of, on appeal.

A reference to panchayatdars was addressed to one individual in the following terms : " You shall select four respectable persons whom you like and along with them you shall examine and pass a decision." He alone signed the award, but with the concurrence of two other *panchayatdars*, thus constituting a majority of the *panchayatdars*. *Held*, he did not form the sole arbitrator in the case nor were the others mere assessors, but all of them were arbitrators and as the award was not unanimous, it was invalid. 38 M. L. J. 145 and 7 Mad. 174 folld. ; 42 Bom. 668 not folld.

Where a decree was altered in proceedings taken by way of review, but pending the same the decree was appealed against, *Quaere* if the appeal could be heard, as the decree had been superseded by a new decree on review. ? 28 All. 240 ; 34 All. 282 ; 36 C. L. J. 484 considered.

V. Govindarajachari for Appellant.

A. Lakshmayya for Respondent.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 786 of 1923.

Contribution—Suit for—Decree declaring liability—If conclusive as to nature and extent of liability.

X, *Y* and *Z* were three brothers, who were members of a join family of which *X* was the manager. *Z* sued *X* and *Y* for partition o certain outstandings due to the family and a decree was passed against them for his share. In execution *Z* recovered the entire amount from *X*, who thereupon sued *Y* for contribution. *Held*, the decree obtained by *Z* is not conclusiye on the question of liability to contribute or the extent of such liability and it was open to *Y* to establish that *X* was solely liable or that both being tort feasors the right to contribution did not exist and that the suit was not maintainable. 25 Mad. 599 folld.

A. Krishnaswami Aiyar and *B. Somayya* for Appellant.

T. V. Muthukrishna Aiyar and *R. Vaidyanathan* for Respondent.

T. S. V.

Devadoss, J.
2nd August, 1926.

S. A. No. 729 of 1923.

Customary right—Proof of—Land in possession of tenants—Acquisition of right—It binds Jenmi or melcharthdar.

The inhabitants of a village brought a suit to establish their right to bathe in a tank belonging to the 1st defendant who was a *melcharthdar* and to pass to and fro through a *paramba* belonging to him. I was in evidence that the tank was intended for irrigation purposes and had been dug by the tenants in possession, and that the villagers had been in the habit of bathing there without obstruction, whenever the water in the river near by was muddy. *Held*, (1) the evidence was not sufficient to establish a customary right as claimed by the villagers; (2) as the property had been throughout outstanding with tenants in possession, even if the villagers had acquired a customary right as against them, it would not bind the Jenmi or the *melcharthdar* claiming under him.

C. V. Anantakrishna Aiyar and *K. Kuttikrishna Menon* for Appellant.

T. R. Ramachandra Aiyar, V. Subramania Aiyar and *T. Krishnan Nambisam* for Respondents.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 1551 of 1923.

Lease—Agraharam—Some co-sharers alone if competent to create a lease—Estoppel—Evidence Act, S. 116.

Some only of the co-sharers of an *agraharam* leased the village sites to a stranger, who sued in ejectment a co-sharer in possession whose ancestor was a former lessee from the *agraharamdars*. *Held*, (1) in the absence of a proved custom, some of the co-sharers alone cannot grant a valid lease on behalf of all, and the lessee cannot sue in ejectment a co-sharer in possession, (2) a co-sharer in possession who is also a lessee from the *agraharamdars* is not estopped under S. 116, Evidence Act, from contending in a suit in ejectment by a subsequent lessee that the later lease is invalid by reason of the inalienability of the property.

A. Krishnaswami Aiyar and *V. Govindarajachari* for Appellants.

S. Varadachari and *M. Ramachandra Rao* for Respondents.

T. S. V.

Ramesam, J.
3rd August, 1926. } S. A. No. 822 of 1923.

Hindu Law—Partition—Suit for by junior member—Alienation by manager—Alienee—Equities in favour of—Partial partition—Plea of—Mesne profits.

In a suit for general partition by a junior member of a joint Hindu family where he had also prayed for the setting aside of a certain alienation by the manager as not being for necessary purposes, it is open to the alienee to plead that other properties not brought into the hotchpot should also be brought into hotchpot and that the alienated properties should be allotted to the share of his alienor, and thus work out the equities in his favour. The plea of partial partition is for this purpose open to strangers also.

Mesne profits in such a suit can be claimed only from the date of suit in the absence of an earlier repudiation.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellants.

K. Rajah Aiyar for Respondent.

T. S. V.

Reilly, J.
4th August, 1926. } C. R. P. No. 725 of 1925.

Partition—Suit for—Interim order for payment of money—Power to pass—Receiver not necessary.

Interim orders for payment of money for support of the plaintiff can be passed in suits for partition and it is not necessary that an application for the appointment of a receiver of the properties should have been made or be pending at the time. Such directions can be given to the parties direct without appointing a receiver.

K. Rajah Aiyar for Petitioner,

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Respondent.

T. S. V.

NRC

Reilly, J.
4th August, 1926.
S. A. No. 1668 of 1923.

Pleader—Plaintiff a minor—Putting defendant on oath—Express authorisation of next friend necessary—Special vakalat.

In a suit on a promissory note, the question of the execution of the document having been put in issue, the pleader for the plaintiff put the defendant on oath and agreed to abide by it. The defendant took oath, whereupon the suit was dismissed. In a suit by the minor to set aside the decree, *held* (1) the pleader not having been expressly authorised by the guardian to abide by the oath of the defendant the decree was not binding on the minor; and (2) a special vakalat is not necessary to authorise the pleader to act as he did.

V. Ramadoss for Appellant.

K. Ramamurthi and *K. Kameswara Rao* for Respondents.

T. S. V.

Jackson, J.
4th August, 1926.
C. M. P. No. 1373 of 1926.

Civil Procedure Code, O. 1, R. 10—Appellate Court impleading a person not a party to the proceedings in the Lower Court—Powers of.

In a suit for specific performance by a purchaser against his vendors, impleading therein a subsequent purchaser and a mortgagee pending suit, a decree was passed in the plaintiff's favour conditional on her paying the balance of purchase money and directing the vendors and the subsequent purchaser to pay the costs; the money was accordingly deposited in Court and the mortgagee filed a petition claiming a charge over the money by way of substituted security impleading in it, the plaintiff in the prior suit and his vendors and it was dismissed. Pending appeal against that order of dismissal, the subsequent purchaser who had a subsisting decree against him for costs wanted to be made a party as a person interested.

Held, that he was neither a necessary nor a proper party to the appeal.

A. Krishnaswami Aiyar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Curgenven, J.
5th August, 1926.
S. A. No. 1667 of 1923.

Provincial Small Cause Courts Act, Sch. II, Art. 7—Enhanced rent—Suit for difference—If cognizable by Small Cause Court—Second Appeal if lies—Civil Procedure Code, S. 102—Inam registers—Entries in—Value of.

A suit to recover the difference between the rent actually payable and a smaller sum paid, on the ground that the true rent payable was more than what had actually been paid for some years is really one for

the assessment, enhancement, or apportionment of the rent of immoveable property and is not cognizable by a Small Cause Court. Even where the amount claimed is less than Rs. 500 a second appeal lies.

Evidentiary value of entries in Inam Registers pointed out.

M. S. Vaidyanatha Aiyar for Appellant.

R. Kuppusami Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

Srinivasa Aiyangar, J.
5th August, 1926.

Re B. I. B. I. C. Ltd. Bombay.

Indian Companies Act, Ss. 3, 164, 199 *and* 200—*Payment orders—Unpaid calls—Transfer of order to mofussil Court—Jurisdiction of High Court.*

Where the registered office of a company was situated at Bombay, and the Bombay High Court passed orders for payment of moneys due for unpaid calls against certain contributories, residing or carrying on business within certain districts in the Madras Presidency and an application was made to the Original Side of the Madras High Court, to direct the District Courts to enforce these orders, *held,* that the combined effect of Ss. 3, 199 and 200 of the Indian Companies Act is to give these orders the force of decrees passed by the Madras High Court, and the Madras High Court has jurisdiction to transfer these orders to the District Courts for execution. Sec. 164 of the Act has no application to such a case. 54 I. C. 384 not followed.

T. D. Srinivasachari and *T. Chakravarti Aiyangar* for Applicant.

T. S. V.

Devadoss, J.
6th August, 1926.

S. A. No. 1777 of 1923.

Transfer of Property (Amendment) Act (XXVII of 1926)—*If retrospective—Attestation—Acknowledgment of signature—Sufficiency of.*

The Transfer of Property (Amendment) Act (XXVII of 1926) is retrospective in operation, as it is meant only to explain the meaning of the word "attestation" as used in the Transfer of Property Act. (1898) A. C. 469; 769; (1878) 3 A. C. 582; 6 Ad. and Ell. 943; 24 Q. B. 557 referred to and principle of construction explained.

Where the attestors to a mortgage deed deposed in evidence that the document after execution was brought to them by the mortgagor and mortgagee for attestation, and they put their signatures on an acknowledgment of execution by the mortgagor, *held,* it was sufficient attestation within the meaning of the Transfer of Property Act.

P. Satyanarayana Rao for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J.
6th August, 1926.

A. S. No. 74 of 1922.

Hindu Law—Joint family—Ancestral and self-acquired properties—Throwing into the common stock—Will—Revocation—Birth of son—Effect of—Oral revocation—Proof—Presumption against intestacy.

The rule of Hindu Law is that where one among two or more co-parceners treats all the properties, ancestral and self-acquired as one, and keeps only one set of accounts, it must be taken that the self-acquisitions had been thrown into the common stock. 45 Cal. 733 ; 25 M. L. J. 57; 29 All. 244 ; 50 Cal. 439 referred to.

The will of a Hindu is not revoked by the mere fact that a son was born to him subsequently. 30 Mad. 369 followed. When a written and registered will is alleged to have been revoked orally the same must be proved by unexceptionable evidence.

When a person has died leaving a will, and a question arises whether the will includes all his properties, the presumption of law is against intestacy. *Cf.* S. 90 of the Indian Succession Act (XXXIX of 1925).

K. S. Krishnasami Aiyangar for Appellant.

A. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Respondents.

T. S. V.

Devadoss, J.
6th August, 1926.

S. A. No. 1736 of 1923.

Hindu Law—Alienation by mother of inherited property—Binding nature of—Necessity.

Where a Hindu mother inherited some property from her father and mother and she sold all that property (being the only property she had) and invested the proceeds on a mortgage security with the result that it ensured a more comfortable and beneficial living for her and her son, and the son filed a suit later for a declaration that it was not binding on him, *held*, that an alienation by the mother stood on an entirely different footing from that made by a father. The mother is not bound to sell her property to maintain herself and her son, unless there was absolute necessity and she could not otherwise preserve herself and the family.

K. Rajah Aiyar for Appellants.

K. Bhashyam, V. C. Veeraraghavan and *T. D. Srinivasachari* for Respondents.

T. S. V

Devadoss, J.
9th August, 1926. } S. A. No. 1768 of 1923.

Transfer of Property Act, S. 52—Applicability—Suit by wife for maintenance—Charge claimed on specific items of properties —Alienation pendente lite—*Validity of.*

A wife sued her husband for maintenance and claimed to have it declared a charge of certain items of properties. Pending the suit, the husband alienated one of the properties. *Held,* the principle of *lis pendens* as laid down in S. 52, Transfer of Property Act, did not apply and the alienation was valid.

K. Kameswara Rao and *K. Ramamurthi* for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V.

Ramesam, J.
9th August, 1926. } S. A. No. 1630 of 1923.

Evidence Act, S. 35—Secondary School Leaving Certificate book—Entry in relating to age of candidate—Admissibility—Relevant fact—If a public document.

A secondary school leaving certificate book in Madras is a public book, register or record within the meaning of S. 35 of the Evidence Act and an entry therein relating to the age of the candidate was a relevant piece of evidence relating to age, having been entered there in the performance of an official duty.

T. M. Krishnaswami Aiyar and *S. Narayana Aiyangar* for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V.

Curgenven, J.
10th August, 1926. } S. A. No. 130 of 1925.

Evidence Act, S. 13—Relevancy—Plaint—Statement in—Question whether property belonged to a Hindu owner—Date of death—Suit to set aside alienation.

A Hindu Widow in possession of her husband's estate sued an alience from her mother-in-law to whom properties had been allotted for maintenance for recovery of possession and obtained a decree. After her death a reversioner sued to set aside an alienation made by her and to recover possession of the property. The alienee pleaded that the property alienated did not belong to the last male holder, whereupon the reversioner put in evidence the plaint in the former suit wherein the properties had been alleged to belong to the last male holder. He also relied on a statement therein of the date of the death of the last male holder. *Held,* under S. 13 of the Evidence Act the plaint was admissible in evidence and relevant to prove that the properties belonged to the last made owner, but not for the purpose of ascertaining the date of death of the last owner. 45 Mad. 332 (F.B.) ; 33 I. C. 446 referred to

C. S. Venkatachari and *A. Venkatachalam* for Appellant.

K. Kameswara Rao for Respondent.

T. S. V.

NRC

Devadoss, J.
10th August, 1926. } S. A. No. 1807 of 1923.

Hindu Law—Partition—Division by metes and bounds—Family arrangement—Plea of ignorance of rights—If a ground to set aside.

A partition in a joint Hindu family does not require a division by metes and bounds; a definition of the shares of the members is sufficient.

A family arrangement arrived at without any concealment or mistake, with no suppression of what is true or suggestion of what is false, even if parties misunderstand the real situation is binding on all parties. Where such an arrangement has been acted upon for some time without anybody objecting to it, a plea by a party that he was ignorant of his rights will not be accepted to set it aside. 35 All. 337, 51 M. L. J. 52; 4 C. L. J. 303; 10 C. L. J. 503; 2 Ch. App. 294 referred to.

S. Varadachari and *R. Narayanaswami Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *M. S. Venkatrama Aiyar* for Respondent.

T. S. V.

Reilly, J.
11th August, 1926. } C. R. P. No. 926 of 1925.

Civil Procedure Code, Ss. 63, 73 and O. 21, R. 20—Attachment of same property in two Courts—Sale by one—Application to set aside sale—Attaching creditor in other Court—Right to apply.

The same property belonging to a person was attached by two decree-holders in two different Courts—one in the Subordinate Judge's Court and the other in the Munsiff's Court. In pursuance of the attachment in the latter Court, the properties were sold, whereupon the attaching creditor in the Subordinate Judge's Court applied under O. 21, R. 90 to have the sale set aside on the ground of fraud. *Held*, he was a person entitled to rateable distribution under Ss. 63 and 73, Civil Procedure Code, and hence could maintain an application under O. 21, R. 90. 26 M. L. J. 305 applied.

N. Chandrasekhara Aiyar for Petitioner.

P. Viswanatha Aiyar for *K. Narasimha Aiyar* for Respondent.

T. S. V.

Krishnan and Odgers, JJ.
11th August, 1926. } A. S. No. 320 of 1924.

Principal and agent—Agency—Termination of—Question of fact—Nattukottai Chettis—Practice.

The question when an agency terminated is one of fact to be determined from the fact and circumstances of each case. Among Nattukottai Chettis who send agents periodically to foreign places like Burma, Singapore, etc., neither the period fixed in the salary chit, nor the actual coming in of a new agent, nor the delivery of account books or the execution of a power-of-attorney by the old agent to such new agent to facilitate the collection of old debts is conclusive as to when

the agency actually terminated. Practice among Nattukottai Chetties adverted to. 31 M. L. J. 685 ; 687 refd. to.

A. Krishnaswami Aiyar and *V. Narayana Aiyar* for Appellant.
M. Patanjali Sastri for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *11th August*, 1926. — A. S. No. 56 of 1922.

Indian Companies Act, S. 4 (2)—"Persons"—Meaning of—Partnership formed of four firms—Individual members—Registration—Carrying on business—What amounts to.

Four separate unregistered trading firms formed themselves into a partnership for the purchase and sale of cotton. The total number of individual partners was more than twenty and in a suit for dissolution of the partnership the question was raised whether the partnership, being unregistered, was not an illegal one under S. 4 (2) of the Companies Act. *Held*, each of the four firms constituting the partnership could not be considered for the purpose of S. 4 (2) as a single person, and for the purposes of the section the individual partners of the various firms should be counted separately. As their number exceeded twenty, and it was not registered, it was not a legal partnership. *26* I. C. 613 folld.

The question whether a partnership carries on business or not is one of fact.

A. Krishnaswami Aiyar and *V. S. Narasimhachari* for Appellant.

The Advocate-General and *C. Sambasiva Rao* for Respondent.

T. S. V.

Ramesam, J. *12th August*, 1926. — S. A. No. 1504 of 1922.

Contract of sale—Breach by vendee—Vendee discharging mortgages on property sold—If entitled to subrogation.

A vendee under an agreement of sale which fell through on account of his own breach, is not entitled to subrogation in respect of moneys paid by him to discharge mortgages subsisting on the property sold, which were paid off in pursuance to the agreement. Nor can he claim the benefit of S. 64 of the Indian Contract Act. The charge that was wiped out is not a benefit that the vendor who accepted the vendee's breach is bound to restore. Case-law considered.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.
S. Varadachari and *P. V. Krishnaswami Aiyar* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *12th August*, 1926. — O. S. A. No. 120 of 1925.

Indian Arbitration Act, Ss. 12 and 13 (2)—Award remitted to arbitrator—No time fixed—Arbitrator making award more than three months later—Order of Judge refusing to extend time—If a

judgment within cl. 15 *of Letters Patent—Appeal—Court—Jurisdiction to extend after award made and filed.*

A Court remitted an award to the arbitrator for reconsideration, but did not fix any time for making a fresh award. An award was actually made and filed in Court more than three months after it was remitted by Court for reconsideration and an application was then made by the successful party for extending the time for making the award. The trial Judge refused to extend the time and dismissed the application. *Held*, (1) the order amounted to a judgment within the meaning of cl. 15 of the Madras Letters Patent and was appealable. 35 Mad. 1 (F. B.) ; 50 M. L. J. 361 applied ; (2) in refusing to extend the time, the Court has no power to consider the propriety or correctness of the award ; and (3) if the Court has power to extend the time, it is a fit case for doing it.

Their Lordships then referred to a Full Bench the question whether in a case where an award is remitted by Court to the arbitrator, but without fixing the time for passing a fresh award, and an award is passed and filed in Court more than three months after, the Court has jurisdiction to extend the time for making the award.

Nugent Grant instructed by *Short, Bewes & Co.* for Appellant.

P. Venkatramana Rao and *M. S. Ratnasabapathi Mudaliar* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J.
12th August, 1926. — A. S. Nos. 220 and 221 of 1921.

Insolvency—Official Receiver—Right to appeal—Breach of contract by vendee—Suit for damages by vendor—Suit by vendee for return of deposit money—First suit decreed and second dismissed—Adjudication of vendee—Effect of.

A contract for the sale of goods having been broken by the vendee, the vendor sued him for damages, while the vendee sued for the return of the deposit money. The former was decreed, while the latter was dismissed. The vendee preferred appeals against both the decisions, but pending appeal he was adjudged insolvent. The Official Receiver claimed to continue both the appeals. *Held*, so far as the suit for return of the deposit amount was concerned, it related to "property" of the insolvent within the meaning of the Provincial Insolvency Act and the same having vested in the Official Receiver, he was competent to continue the appeal against the dismissal of the suit; the suit by the vendor for damages however stood on a different footing and the rights involved therein did not amount to " property " vesting in the Official Receiver and hence it was not competent for him to continue the appeal.

C. V. Anantakrishna Aiyar and *P. V. Krishnaswami Aiyar* for Appellants.

A. Krishnaswami Aiyar for Respondent.

T. S. V.

Ramesam, J.
3rd August, 1926. } S. A. No. 1610 of 1923.

Hindu Law—Joint family—Father—Reference to arbitration—Property allotted to stranger—If binding on son—Representation in suits—Decree when binding on sons.

A reference to arbitration made *bona fide* by a Hindu father under which a portion of the family properties is allotted to a stranger is binding on his son.

Whether a Hindu son is represented by his father in a suit to which the son was not co-nominee is a question of fact to be decided with reference to the facts of each case.

If the father is manager and the question in issue is one which equally affects him and the other members of the family and if the suit is properly defended the adjudication will bind all the persons interested with the father since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound if being of full age and knowing of the litigation they acquiesce in the conduct of it by his father. 29 Mad. 461 followed.

G. Lakshmanna for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V

Devadoss, J.
10th August, 1926. } S. A. No. 1760 of 1923.

Promissory note—Joint execution—Renewal by one alone—Amount realised from him after original note had become barred—Suit for contribution—If lies.

A pronote debt due by *A* and *B* jointly was renewed and a fresh pronote executed by *B* only, on the strength of which a decree was obtained by the creditor against *B* only and the entire amount realised from him only long after the original debt had become barred by limitation against *A*.

In a suit by *B* thereafter within three years from the date of payment under the decree for contribution,

Held, *B* had no cause of action to sustain a suit for contribution, *A* not having been a party to the renewal of the pronote. 39 Mad. 288, 26 Mad. 322 distinguished.

Ch. Raghava Rao for Appellant.

C. Sambasiva Rao for Respondent.

T. S. V.

Devadoss, J.
12th August, 1926. } S. A. No. 1523 of 1923.

Contract Act, S. 16—Scope of—Undue influence—Presumption when drawn—Specific allegation and proof—Instrument—Setting aside—Limitation Act, Art. 91—Finding of fact—Interference—Second Appeal.

S. 16 of the Indian Contract Act covers all cases in which from the position of the parties a presumption of undue influence can be drawn.

NRC

It is not enough in law to make a general allegation of the exercise of undue influence. Specific evidence that the transaction in question was brought about by undue influence and is hence vitiated by it must be let in. 36 Ch. D. 145 ; 10 E. R. 1192 ; 11 P. D. 82 ; 41 M. L. J. 474 referred to.

Art. 91 of the Limitation Act applies to a suit to set aside an instrument vitiated by undue influence and the cause of action for such a suit arises on the date of execution of the document. 25 Bom. 78 ; 26 Mad. 349 ; 41 M. L. J. 474 , 15 Cal. 58 (P. C.) referred to.

The High Court will interfere even with findings of fact in second appeal when they are arrived at on no evidence.

T. V. Venkatrama Aiyar for Appellant.

S. Subramania Aiyar for Respondent.

T. S. V.

Devadoss, J.
12th August, 1926. } S. A. No. 1826 of 1923.

Malabar Compensation for Tenants' Improvements Act, S. 6 (2)—Redemption—Decree for rent obtained—Right of set off—If allowed.

In a redemption suit in Malabar, where a decree for arrears of rent has already been passed during the pendency of the mortgage, but the execution of such decree is not barred at the time of passing the redemption decree, the Court has power under S. 6 (2) of the Malabar Compensation for Tenants' Improvements Act to allow a set off with respect to the decree amount as against the value of improvements found payable under S. 6 (1) of the Act.

K. P. Krishna Menon for Appellant.

A. K. Balakrishnan for Respondent.

T. S. V.

The Offg. Chief Justice,
Krishnan, Ramesam,
Venkatasubba Rao
and Curgenven, JJ.
13th August, 1926. } L. P. A. No. 125 of 1924.

Insolvency—Hindu father—Sale by Official Receiver prior to vesting order—Subsequent order—Effect of—Sale—Validity—Official Receiver—If agent of Court—Ratification—T. P. Act, S. 43.

Where on a Hindu father becoming insolvent, the Official Receiver sells some family properties prior to the vesting of the estate in him and a vesting order is passed subsequently, *held* by a majority of the Full Bench (Krishnan, J. dissenting) the principle of S. 43 of the Transfer of Property Act applies and the sale is valid.

The Official Receiver is not the agent of the Court when he acts in such matters and no question of ratification can arise.

Case-law discussed.

The Hon'ble Mr. V. Ramadoss and *V. Krishna Mohan* for Appellant.

S. Varadachari and *N. Rama Rao* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. 13th August, 1926. — A. S. Nos. 120, 262, etc. of 1922.

Hindu Law—Partition—Sisters—Survivorship—Document in writing registered—Alienation—Surviving sister—Right to impeach.

A partition between Hindu sisters of properties inherited from their father, destroying their mutual rights of survivorship can be made without a document in writing, registered. 34 Mad. 72 folld. Where such a partition was made and alienations conferring absolute rights had followed thereon by each of the sisters, it is not open to the surviving sister on the death of the other to sue for the recovery of the share of the deceased.

The Advocate-General, B. Sitarama Rao, S. R. Muthuswami Aiyar and *Watrap S. Subramania Aiyar* for Appellants.

A. Krishnaswami Aiyar and *K. Rajah Aiyar* for Respondents.

T. S. V.

The Offg. Chief Justice and Curgenven, J. 13th August, 1926. — A. S. No. 422 of 1922.

Hindu Law—Applicability—Jains—Adoption—Consent of sapindas—If necessary.

In the absence of a custom or local usage, Jains are governed by the Hindu Law and an adoption by a Jain widow in the Madras Presidency without the authorisation of her husband or the consent of his *sapindas* is not valid. Case-law discussed.

Per Kumaraswami Sastri, O. C. J.—If the matter were *res integra*, a Court should hold that Jains are not Hindus do not follow Hindu scriptures and hence the rules as to consent of *sapindas* for making an adoption should not be applied to them. History of Jainism traced and its difference from Hinduism pointed out.

C. Sambasiva Rao for Appellant.

P. Venkatramana Rao and *V. S. Narasimhachari* for Respondents.

T. S. V.

Curgenven, J. 13th August, 1926. — S. A. No. 1249 of 1923.

Transfer of Property (Amendment) Act (XXVII of 1926)—Attestation—Meaning of—Act if retrospective.

Act XXVII of 1926 which explains the meaning of the word "attestation" in the Transfer of Property Act is retrospective in effect. Decision of Devadoss, J. in S. A. No. 197 of 1923 folld.

K. S. Jayarama Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Jackson, J.
13th August, 1926. } C. M. S. A. No. 27 of 1925.

Limitation Act, S. 20—Agent—Payment by—Court paying out moneys—If agent of decree-holder.

X obtained a decree against the sons of *Y* on a promissory note executed by *Y* and pending the suit obtained attachment before judgment of a fund deposited in another Court by a debtor of *Y* in execution proceedings. The decree of *X* was transferred to that Court for execution and the sum attached was paid over to him. For the balance of the decree amount, *X* took out application for execution and relied on the fact of payment by Court of the attached amount as saving limitation under S. 20 of the Limitation Act. *Held*, the Court could not be considered the agent of the judgment-debtor within the meaning of S. 20 as the element of volition was lacking and a fresh period of limitation could not be computed therefrom. 41 M. L. J. 423 and 11 H. L. 115 referred to.

K. Subba Rao for *V. Ramadoss* for Appellant.

A. Venkatachelam for Respondent.

T. S. V.

Curgenven, J.
13th August, 1926. } S. A. No. 57 of 1924.

Hindu Law—Adoption—Will—Directions in—Properties given to widow—Sale of properties by decree-holder against adopted son—Suit to recover.

A testator by his will authorized his widow to adopt and made certain dispositions in her favour to be enjoyed for her life. She made an adoption and incurred a promissory-note debt as guardian of the adopted son, for a necessary purpose. In execution of the decree on the promissory note, the properties given to the widow were attached and sold, as though the adoption related back to the death of the testator and the properties belonged to the adopted son. The widow sued to recover the properties. *Held*, (1) the adoption did not relate back to the date of death of the testator. 43 Bom. 778 (P. C.) distd.; (2) as the direction regarding adoption was conditional on the adoptee observing the directions relating to the disposition in favour of the widow, the adopted son could not approbate and reprobate at the same time. 46 Mad. 300; 21 Mad. 10 followed.

P. Somasundaram for Appellant.

K. Venkatrama Raju for Respondent.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1751 of 1923.

Hindu Law—Adoption—Widow—Assent of sapindas*—Reversioner withholding consent—Existence of other reversioners not proved—Adoption if valid.*

The mere fact that the only *sapindas* who are proved to have been in existence withheld their assent when a Hindu widow applied to them

for their consent will not enable her to make an adoption, even if the withholding of assent has been improper. In Southern India, before a Hindu widow can make an adoption, some *sapinda* must have given his assent.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant.

C. Sambasiva Rao for Respondent.

T. S. V.

Jackson, J.
16th August, 1926. } Cr. Rev. Case No. 516 of 1925.

Criminal Procedure Code, S. 403—Plea of autre fois acquit—*Charge under S. 420, Indian Penal Code—Former trial ending in acquittal—Second trial for the same offence under a different description.*

The accused sold some properties to the complainant and induced the latter to pay Rs. 3,000 agreeing to deposit Rs. 1,350 in Court to raise an attachment then subsisting. He also represented there were no other encumbrances. He did not deposit the amount in Court and it subsequently transpired there was another encumbrance on the properties for Rs. 5,000. The complainant charged the accused with having cheated him by taking the amount and failing to pay Rs. 1,350 into Court. The case ended in an acquittal. He subsequently filed another complaint for cheating by taking away Rs. 3,000 on a false representation that there were no other encumbrances on the property. *Held*, the second trial was illegal by reason of S. 403, Criminal Procedure Code. 28 All. 312 referred to.

V. L. Ethiraj and *K. G. Srinivasa Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1842 of 1923.

Limitation Act, Ss. 6, 7 and Art. 125—Alienation by Hindu limited owner—Suit to set aside—Plaintiff a minor at the date of alienation—Suit within three years of majority but more than 12 years after alienation—Existence of other reversioners who could have sued—Effect.

A suit was filed by a Hindu reversioner to set aside an alienation made by a Hindu limited owner more than 12 years after the alienation, but within three years of the plaintiff attaining majority. The plaintiff was a minor at the time of the alienation, but the facts showed there were other reversioners of the same degree who could have sued to set aside the alienation. *Held*, there was only a single cause of action to sue for the whole body of reversioners and the other reversioners not having exercised their right within the period fixed by Art. 125 of the Limitation Act, the suit was barred, and the plaintiff could not get the benefit of Ss. 6 and 7 of the Act. 41 Mad. 659 applied; 48 All. 152 (P.C.) distinguished.

B. Sitarama Rao and *A. Swaminatha Aiyar* for Appellant.

T. M. Ramaswami Aiyar, E. Krishna Aiyar and *K. V. Sesha Aiyangar* for Respondents.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1821 of 1923.

Hindu Law—Gift—Construction—Estate taken—Gift to unborn children—Person having only a spes successionis—*Attestation—Effect of—" Heirs "—If includes class.*

S and *R* made a gift of a small portion of their family property to *M* in the following terms : " As we have given the said lands to you from our family property as *stridhanam*, you shall yourself cultivate the said lands, pay the Circar cist, etc., due on the lands and enjoy them. If you have male issue, such male issue alone shall take the property after your life-time. You shall not encumber the lands by way of mortgage, etc. . . . If you have no male issue, then our heirs shall take the aforesaid lands." The lands were subsequently sold to the defendants and other lands purchased, and the sale deed was attested by *R*. *M* died without issue in 1918 and the sons of *R* sued for their share of the property gifted to *M*, *Held* (1) *M* took only a life-interest in the property ; (2) the gift in favour of the unborn children of *M* was valid under Madras Act I of 1914 ; (3) *R*. having only a *spes successions* during the life-time of *M*, his attestation will not estop him or his heirs ; and (4) the word "heirs" did not indicate a "class of persons" and the English decisions on the subject were not applicable.

A. V. Viswanatha Sastri for Appellants.

T. V. Ramanatha Aiyar for Respondents.

T. S. V.

Reilly, J.
18th August, 1926. } C. R. P. No. 656 of 1924.

Indian Contract Act, S. 45—Partnership—Dissolution of—Suit on a pro-note—Some alone suing—Other partners joined after lapse of period of limitation—Effect.

In a suit to recover a debt due to a partnership, even after dissolution of the partnership all partners must join. If the suit is instituted by some alone within time, and the other partners are joined after the period of limitation has expired, the whole suit is barred under S. 22 of the Limitation Act.

T. A. Ananta Aiyar for Petitioner.

S. Sankara Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
19th August, 1926. } S. A. No. 1261 of 1923.

Inam—Swastivachakam *service—Alienation of—Validity—Alienation in favour of member of family—Effect.*

A sale of *Swastivachakam* service *inam* lands is void and the fact that it is in favour of a member of the inamdar's family who is actually performing the services for which the *inam* was granted does not affect the question of its validity. 45 Mad. 620 ; 1 L. W. 827 ; 6 Mad. 76 ; 15 Mad. 183 ; 38 Mad. 650 followed.

T. V. Subba Rao for Appellants.

K. N. Rajagopala Sastri for Respondent.

T. S. V.

Jackson, J.
12th August, 1926.
Cr. Rev. Case No. 64 of 1926.

Criminal Procedure Code, S. 147—Preliminary order—Omission to state likelihood of breach of peace—Effect of.

A preliminary order under S. 147 of the Criminal Procedure Code is not bad because it failed to state that in the opinion of the Magistrate there is a likelihood of the breach of the peace. 27 M. L. J. 587 followed.

K. Kameswara Rao for Petitioner.

The Public Prosecutor (J. C. Adam) for the Crown.

T. S. V.

Curgenven, J.
13th August, 1926.
S. A. No. 30 of 1924.

Deed—Construction—Will or conveyance—Suit against X—Death of X—Heir impleaded—Property bequeathed to legatee proceeded against—Legatee if bound.

Where a document described as a "conveyance deed" provided that after the death of the donor the properties should be enjoyed by the *donee* with absolute rights and that the donor should not during his lifetime execute any deeds with respect to the said property, *held*, on a construction of the document, that it was not a will but a conveyance which came into operation immediately and not after the death of the donor. 46 M. L. J. 288, 33 Mad. 304; 8 Cal. W. N. 614 considered.

In a suit to recover money due from *X*, *X* died during the pendency of the suit having bequeathed a portion of his property in favour of *Y*. As the legal representative of *X* his heir alone was brought on record in the suit but not the legatee and a decree was obtained. In execution of the decree the properties bequeathed to the legatee were attached.

Held, the decree was not binding on the legatee as he was a necessary party to the suit. 14 Cal. W. N. 1041; 26 Cal. 103; 32 Cal. 315 applied.

K. Ramamurthi and *K. Kameswara Rao* for Appellant.

P. Venkataramana Rao for Respondent.

T. S. V.

Jackson, J.
19th August, 1926.
C. R. P. Nos. 576 and 577 of 1926.

Civil Procedure Code, O. 39, R. 2—Temporary injunction—Balance of convenience—Proof of prima facie *title—Injunction in terms mandatory—Power to grant.*

Mere balance of convenience is not the only consideration to be taken into account in deciding whether a temporary injunction should or should not be issued. Proof of *prima facie* title is equally essential. An order granting injunction solely upon a consideration of convenience is without jurisdiction.

NRC

A Court cannot, under O. 39, R. 2, Civil Procedure Code, grant a temporary injunction in terms mandatory. It is, however, competent to issue a temporary injunction which is prohibitory in form even though in effect it may be mandatory. 38 Bom. 381 ; 41 Mad. 208 ; 41 C. 436 and 16 Bom. L. R. 566 considered.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Petitioners.

V. Govindarajachariar for Respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
20th August, 1926.

Cr. Rev. Cases Nos. 377 to 404 of 1926.

Madras District Municipalities Act, Ss. 249, 250 and Sch. V, cl. (q)—Setting up rice-hulling machine—Construction of—Permission obtained—Working of mill—Process likely to be dangerous to human life or health or property—Annual license from Chairman—If necessary.

The accused obtained the permission of the Madura Municipality for installing a rice-hulling machine under S. 250 of Madras Act V of 1920, and began hulling rice without obtaining a license from the Chairman under S. 249. They were prosecuted under S. 338 of the Act, and the Magistrate found as a fact that the business carried on was an industrial process " likely to be dangerous to human life or health or property " within Sch. V, cl. (q). *Held*, taking out the permit to construct a factory or instal machinery under S. 250 did not absolve the accused from the necessity to take out annual licenses under S. 249. Scope of the two sections explained. Cr. Rev. Case No. 503 of 1925 : 50 M. L. J. 384 dissented from ; 45 M. L. J. 731 applied ; 45 M. L. J. 555 referred to.

The Public Prosecutor for Petitioner.

S. T. Srinivasagopalachari for Accused.

F. S. Vas for the complainant Municipality.

T. S. V.

Devadoss, J.
20th August, 1926.

S.A. Nos. 1788 and 1789 of 1923.

Landlord and tenant—Forfeiture—Mulgeni lease—Clause prohibiting alienation in favour of " any other person "—Co-lessees—Alienation by one lessee in favour of co-lessee—Alienation in favour of heir—If works out forfeiture—English Law—Applicability.

A *mulgeni* lease granted in favour of three persons, members of one and the same family, contained a clause prohibiting alienation in favour of "any other person". One of the lessees made an alienation in favour of a co-lessee, while there was another alienation to a daughter of one of the co-lessees. The landlord sued in ejectment, claiming forfeiture on the ground of the two alienations. *Held*, the alienation in favour of a co-lessee would not work forfeiture as it did not amount to an alienation to "any other person" within the meaning of the forfeiture clause ; but (2) the alienation to the daughter, though it was to an heir on whom

the lease would devolve on the death of her father, worked a forfeiture and the landlord was entitled to sue in ejectment. Case-law discussed.

B. Sitarama Rao and *K. Y. Adiga* for Appellant.

S. T. Srinivasagopalachari and *K. P. Sarvothama Rao* for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
20th August, 1926. } S. A. No. 1411 of 1923.

Malabar Compensation for Tenants' Improvements Act, S. 19—Lease of lands prior to 1886—Improvements to be paid for at customary rate–Renewal after 1886—Rates fixed lower than under the Act—Rate of compensation—Law applicable.

A *kushikanom* deed of the year 1871 provided for payment of compensation at the customary rate ; this was renewed in 1883 and the document fixed a certain rate for payment of compensation, which was less than the rate payable under the Malabar Compensation for Tenants' Improvements Act, and the same rate was incorporated in a later renewal of 1895. In a suit for ejecting the lessee the question arose as to the rate at which compensation was to be paid for improvements. *Held*, (1) as the deed of 1871 did not specify any rate, but only provided for payment of the customary rate, all improvements made between 1871 and 1883 should be paid for at the rate fixed under the Act. 33 Mad. 218 folld.; and(2) improvements effected between 1883 and 1895 should be paid for at the rate fixed in the *kushikanom* deed of 1883, even though the rate contained therein is less than the rates due under the Act. S.A. No. 1645 of 1922 and 40 Mad. 594 folld.

K. Kuttikrishna Menon for Appellant.

O. A. Krishna Variar for Respondent.

T.S. V.

Curgenven, J.
27th August, 1926. } S. A. No. 1705 of 1923.

Madras Estates Land Act, S. 12—Trees—Right—Contract in writing—Nature of.

In a suit for a declaration that the trees belonged to the Zemindar, he relied on a *muchilika* executed by the tenants in which they stated that they had no right to the trees on the holding during a particular year. *Held*, "the contract in writing" referred to in S. 12 of the Estates Land Act must be a contract subsisting during the period in dispute. L. P. A. No. 33 of 1925 relied on. Scope of S. 12 adverted to.

C. V. Anantakrishna Aiyar for Appellant.

B. Jagannadha Doss for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926.
S. A. No. 72 of 1924.

Mahomedan Law—Minor—Alienation of share by mother—Invalidity of—Subsequent setting aside of partition—Alienee—Equities in favour of.

A Mahomedan mother acting as the *de facto* guardian of her minor son made an alienation of a certain property belonging to her husband's estate. The son after attaining majority sued for partition treating the alienation as not binding, the alienee being also a party to the suit. *Held*, in allotting the shares, the Court should, if possible, allot the alienated property to the share of the mother, so that the equities in favour of the alienee might be worked out.

K. S. Jayarama Aiyar for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926.
S. A. No. 52 of 1924.

Hindu Law—Widow—Alienation by—Presumptive reversioner relinquishing rights—Effect on after-born sons—Reversioner if claims through another.

A presumptive reversioner executed a deed of relinquishment of rights in favour of a vendee from a Hindu widow after taking some properties and some cash from the alienee. The deed was executed by him on his own behalf and as guardian of his minor son, and by another son who was a major at that time. Subsequently a third son was born. The presumptive reversioner predeceased the widow and his three sons happened to be the actual reversioners. In a suit instituted by them to set aside the alienation the Courts below held that all of them were estopped from questioning the alienation as their father had ratified the transaction after taking some benefit which the plaintiffs have inherited.

Held, (1) the 1st plaintiff, who joined the deed of relinquishment, was estopped he being a major at that time and though he was not even a presumptive reversioner; (2) that the 2nd plaintiff, being a minor at the time of the relinquishment deed, it was not competent for the father to barter away his rights which was only a *spes successionis*. 46 Cal. 566 followed; (3) that second and third plaintiffs were not estopped as they did not claim through their father. 24 Cal. 94; 42 Mad. 523 followed, and the fact that the plaintiffs 2 and 3 retained the benefit obtained by their father did not matter. 30 C. L. J. 56 followed.

K. Kameswara Rao for Appellant.

P. Somasundaram for Respondent.

T. S. V.

Ramesam and Reilly, JJ.
27th August, 1926. } A. S. No. 15 of 1926.

Civil Procedure Code, S. 80—Scope of—Suit against Official Receiver—Injunction restraining sale—Notice if necessary—"Act"—Meaning of.

Where a suit was brought against an Official Receiver for a declaration that the properties in the suit which had been advertised for sale by the Official Receiver as belonging to the insolvent were the properties of the plaintiff and for an injunction restraining him from holding the sale, *held*, no notice as contemplated by S. 80, C. P. Code, is necessary and the suit filed without giving such notice is good.

The word "act" in the phrase "act purporting to be done by him" in S. 80 means and includes only a completed act or an act begun but not completed and cannot include a threatened act, to be begun and completed in the future. 36 Cal. 28 ; 32 Bom. 243 ; 48 Bom. 87, folld.; 39 M. L. J. 151, considered.

Per *Ramesam, J.*—The suit in such cases is laid only in respect of the threatened future act of sale and cannot be regarded as laid in respect of the past acts such as advertisement of sale, etc.

Per *Reilly, J.*—S. 80 being a restrictive section should be strictly construed, and should not be applied to suits such as for injunction where irremediable damage would occur by insisting on the statutory notice.

C. S. Venkatachari for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
27th August, 1926. } A. S. No. 99 of 1923.

Mortgage—Redemption—Usufructuary mortgage—Term fixed—Extension of—Mortgagee unable to get possession due to fault of mortgagor—Effect of.

The term fixed in a usufructuary mortgage cannot be extended even though for a portion of that period the mortgagee was unable to get possession on account of the fault of the mortgagor. 25 Mad. 587 and S. A. No. 219 of 1896, folld.

An *othi* was created for a period of 10 years from the expiry of a first mortgage on the suit property. Subsequently a third mortgage was created and the third mortgagee redeemed the first mortgage on the expiry of his term. Two years later the *othidar* sued for redemption and got possession from the third mortgagee a year later. When the period of 10 years expired, the third mortgagee sued to redeem the *othidar* and the Court below held the latter was entitled to remain in possession for the period he was kept out and that the suit was premature. *Held*, the period fixed could not be extended and the suit filed at the expiry of 10 years was not premature.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

S. Muthiah Mudaliar and *A. C. Sampath Aiyangar* for Respondent.

T. S. V.

N R C

The Chief Justice, Krishnan and Curgenven, JJ.
1st September, 1926.

A. S. No. 61 of 1924.

Civil Procedure Code, S.13, Exception (b)—Foreign judgment—Default of appearance—Judgment if one given on the merits—Suit on.

A foreign judgment obtained on default of appearance is not given on the merits of the case and is not conclusive as to any of the matters adjudicated therein. 40 Mad. 112 (P. C.) and 45 Mad. 496 (P. C.) referred to.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Appellant.

K. V. Krishnaswami Aiyar and *N. Kunchitapadam Aiyar* for Respondents.

T. S. V.

Devadoss, J.
1st September, 1926.

S. A. Nos. 1723 and 1724 of 1923.

Practice—Second Appeal—Point expressly not pressed by pleader in Trial Court—Plea one relating to jurisdiction—If can be raised newly—Madras Estates Land Act, S. 3 (2) (*d*)—*Estate.*

An issue which involves an investigation of facts and which the pleader in the Trial Court says he does not press will not be permitted to be taken in second appeal, even though the plea raised thereby may relate to the jurisdiction of the Court to entertain the suit.

Where a *Dharmasasanam* village in a permanently settled Zamindari is admitted to consist of *Kudi* and *Pannai* lands and the *melvaram* and the *kudivaram* in the *Kudi* lands are admitted to belong to the plaintiff and defendant, respectively, the Court is not wrong in presuming that the village is an estate within S. 3, cl. 2 (*d*) of the Madras Estates Land Act.

P. R. Srinivasan for Appellants.

A. Sundaram Aiyar for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926.

S. A. No. 1520 of 1923.

Transfer of Property Act, S. 53—*Sale in fraud of creditors—Test of—Intention—Part of consideration found to be actually paid—Vendee if entitled to charge.*

Where a sale is liable to be set aside under S. 53 of the Transfer of Property Act as one in fraud of creditors, but it is found that a portion of the consideration fixed was actually paid and went to discharge some simple money debts of the vendor, the vendee is not entitled as a matter of right to a charge in respect of the consideration actually found paid. 10 Mad. 6 ; 24 M. L. J. 266 ; 7 C. L. J. 586 ; 43 Bom. 759, folld. ; 19 L. W. 135, dissented from ; 33 Mad. 334; 36 Mad. 29, distd.; 43 Cal. 831 (P. C.) and 44 Cal. 662 (P. C.), considered.

Essentials of a suit under S. 53 discussed.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for Appellant.

N. Chandrasekhara Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ. *2nd September*, 1926. } S. A. Nos. 433 to 438 of 1924.

Madras Estates Land Act, S.3 (4)—*Cocoanut garden—Digging shallow pits or wells at a cost of a few annas—If an improvement —Test of—Cocoanut tree—If a fruit tree.*

In the case of a cocoanut garden, sinking wells or shallow pits at the expense of a few annas cannot be said to be an improvement within the meaning of S. 3 (4) of the Estates Land Act. The real test in such cases is to see if the holding has risen in value by reason of the alleged improvement.

Cocoanut trees are not fruit trees within the meaning of S. 3 (4) (*f*) of the Act.

M. Patanjali Sastri and *C. Rama Rao Saheb* for Appellants.

B. Sitarama Rao and *V. Ramaswami Aiyar* for Respondent.

T. S. V.

Devadoss and Wallace, JJ. *2nd September*, 1926. } S. A. No. 1191 of 1924.

Limitation Act, Art. 12 (*a*)—*Decree against Hindu father—Sale of joint family property in execution—Suit by son challenging —Cause of action—Limitation—Period of.*

Where in execution of a decree obtained against a Hindu father alone, the decree-holder sells in Court auction an item of joint family property the remedy of the sons is to challenge the sale by proving that the decree debt was for an illegal or immoral purpose. The sale is not void, but only voidable, and the period of limitation applicable to such a suit is one year under Art. 12 of the Limitation Act. Case-law discussed.

Watrap S. Subramania Aiyar for Appellant.

T. M. Krishnaswami Aiyar, M. Krishna Bharati and *C. S. Swaminathan* for Respondents.

T. S. V.

Devadoss and Wallace, JJ. *2nd September*, 1926. } S. A. No. 1142 of 1923.

Mahomedan Law—De facto *trusteeship—Conception if known to—Suit for rent by* de facto mutawalli—*If lies.*

The conception of a *de facto* trustee is not foreign to Mahomedan Law and it is competent to the *de facto mutawalli* of a mosque to sue tenants for arrears of *melwaram* due. Tyabji Mahomedan Law, p. 627; 37 All. 90; 63 I. C. 171 and 38 Mad. 262, referred to.

N. Chandrasekhara Aiyar and *V. N. Shama Rao* for Appellant.

K. Rajah Aiyar and *S. Rajagopalachari* for Respondent.

T. S. V.

Devadoss, J.
2nd September, 1926.
S. A. No. 1839 of 1923.

Limitation Act, Art. 47—Applicability—Possession proceedings under S. 145, Criminal Procedure Code—Order in favour of a party—Suit by him to recover possession—Limitation.

Where proceedings under S. 145, Cr. P. Code, take place and the Magistrate passes an order in favour of one of the parties, a suit by him to recover possession is not governed by Art. 47 of the Limitation Act. Even though at the time of passing the order, possession is with the defendant, the effect of an order under S.145, Cr.P. Code, upholding the right of the plaintiff is to treat such possession as on behalf of the successful party and he has the ordinary period of 12 years for suing to recover possession. Scope of Art. 47 explained ; and the alteration in the language of S. 145 adverted to.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Appellant.

A. Venkatrayaliah and *L. Venkatanarasiah* for Respondents.

T. S. V.

Devadoss, J.
2nd September, 1926.
S. A. No. 1887 of 1923.

The Madras District Municipalities Act (V of 1920), Ss. 85 and 367—Arrears of house tax accrued due under old Act—Suit for recovery of—Suit after new Act came into force—Charge if can be claimed—Substantive right.

In respect of arrears of house tax which had accrued due prior to the coming into force of the Madras District Municipalities Act (V of 1920), a Municipality filed a suit for the recovery thereof after the new Act came into force and claimed a charge on the house by virtue of Ss. 85 and 367. *Held*, S. 367 dealt only with the mode of recovery and made the procedure under the new Act applicable in respect of suits filed after it had come into force, but the substantive rights of the parties were not affected by the coming into force of the new Act. S. 367 had not the effect of making S. 85 retrospective

G. Lakshmanna for Appellant.

B. Jagannath Das for Respondent.

T. S. V.

Odgers, J.
13th August, 1926. } S. A. No. 1639 of 1923.

Adverse possession—Mortgagor and mortgagee—Deposit of money by mortgagor under S.83, Transfer of Property Act—Suit to redeem—Decree directing mortgagee to draw out money and deliver possession—Effect of.

Where a mortgagor deposited the mortgage amount into Court under S. 83, Transfer of Property Act, and subsequently filed a suit for redemption and obtained a decree directing the mortgagee to withdraw the amount in Court deposit in full satisfaction of the mortgage claim and re-deliver the property to the mortgagor, ***held***, the relationship of mortgagor and mortgagee ceased with the decree and thereafter the possession of the mortgagee was adverse to the mortgagor. 14 C. W. N. 1001 ; 7 L. W. 269 referred to.

V. C. Veeraraghavachari for *K. Bhashyam Aiyangar* for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926. } S. A. No. 1692 of 1923.

*Civil Procedure Code, S. 11—Vendor and vendee—Prior suit in Munsif's Court for possession—Subsequent suit in sub-Court for refund of consideration—*Res judicata*—Civil Procedure Code, O. 2, R. 2—Bar of suit—Limitation Act, Art. 116—Time when begins to run.*

The plaintiff purchased in 1909 certain properties from the husband of the defendant. As he was unable to get possession, he sued his vendor and another who claimed title in the Munsif's Court for possession. The suit was decreed in the Trial Court, but dismissed on appeal. In 1919 the plaintiff sued in the Court of the Subordinate Judge for recovering the consideration amount paid for the sale. The defendant contended that the sale was nominal, and without consideration and was barred under O. 2, R. 2 and was not within time. *Held* (1) the finding of the munsiff in the prior suit that the sale was supported by consideration, if it had not been appealed against, was conclusive between the parties and operated as *res judicata* in the present suit ; (2) though the present suit had been filed in the Court of the Subordinate Judge by adding certain other items, such as the costs of the prior suit, for the purpose of seeing if the finding in the prior case operated as *res judicata*, the Court could split up the claims and see if the claim as regards the consideration amount was not cognisable by the munsiff who tried the prior suit ; (3) the suit was not barred by O. 2, R. 2 ; (4) the period of limitation is six years under Art. 116 of the Limitation Act, and began to run from the date of the sale and not the date of the judgment in appeal in the former suit which negatived the claim of the plaintiff. Case-law discussed.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

W. S. Subramania Aiyar for Respondent.

T. S. V.

N R C

Jackson, J.
2nd September, 1926. } Cr. Rev. Case No. 146 of 1926.

Penal Code, S. 225-B—Escape from arrest—Warrant giving wrong description of accused—If illegal.

Where an arrest warrant described the accused as plaintiff instead of as defendant, but there was no mistake about the name or identity of the accused who was convicted for an offence under S. 225-B, Indian Penal Code, *held*, the wrong description of accused will not make the warrant illegal unless the accused has been prejudiced. 51 C. 902 ; 5 C.W.N. 413 referred to.

K. P. Ramakrishna Aiyar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926. } S. A. Nos. 433 to 438 of 1924.

Madras Estates Land Act, Section 3 (4) (a) and (f)—Improvement—Raising of cocoanuts by digging pits or springs on river-beds.

Pits or springs dug on river-beds for purposes of irrigation, though generally called wells, cannot be considered to be improvements within the meaning of S. 3 (4) (*a*) of the Madras Estates Land Act.

Cocoanuts cannot be called fruits and the raising of cocoanuts does not amount to planting of fruit trees within Section 3 (4) (*f*) of the Act.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for Appellant.

B. Sitarama Rao and *V. Ramaswami Aiyar* for Respondent.

N. S.

Odgers, J.
3rd September, 1926. } S. A. No. 122 of 1924.

Malabar Law—Thiyyas of Calicut—If entitled to compulsory partition-Hindu Law—If applies.

His Lordship referred to a Bench the question whether the Thiyyas of Calicut were entitled to compulsory partition, and whether they are governed by Hindu Law in all respects. 17 M. 184 ; 39 M. L. J. 427 referred to.

K. P. Ramakrishna Aiyar for Appellant.

M. C. Sridharan for Respondent.

T. S. V.

Srinivasa Aiyngar, J.
7th September, 1926. } O. P. No. 185 of 1926.

Succession Act (XXXIX of 1925), S. 301—Non-taking of probate—Right of legatee to apply for removal of executor.

Under S. 301 of the Indian Succession Act, a legatee can put in a petition for the removal of an executor although no probate has been taken.

M. S. Venkatarama Aiyar with *S. Jagadisa Aiyar* for Petitioner.

J. A. Pinto and *V. C. Gopalaratnam* for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
9th September, 1926.
C. M. A. No. 107 of 1925.

Civil Procedure Code, S. 151 *and* O. 41, *R.* 23—*Remand under inherent power—Power of Court—Order not appealable.*

An Appellate Court has power to remand a suit to the trial Court under its inherent powers in cases not covered by O. 41, R. 23. In such a case the order is not appealable. 44 Cal 929 ; 3 Pat. L. J. 253 ; 45 Mad. 449, 900 ; 48 Mad. 713 referred to.

B. Somayya for Appellant.

M. Patanjali Sastri for Respondent.

T. S. V.

Krishnan, J.
9th September, 1926.
C. R. P. No. 865 of 1925.

Civil Procedure Code, *Ss.*73, 151, *O.*21, *Rr.*72, 82, 90—*Purchase in Court auction by decree-holder—Amount set off for decree—Application by another decree-holder for rateable distribution—If entertainable—Application by decree-holder to set aside sale—Power of Court.*

A decree-holder purchased the attached property in auction and had his decree amount set off against the purchase amount. Subsequently another decree-holder whose execution petition was pending applied for rateable distribution under S. 73. Then the first decree-holder applied to have his sale set aside as he was unaware of the pendency of the second execution petition.

Held, the sale could not be set aside as O. 21, Rr. 89, 90 will not apply and the second decree-holder was entitled to rateable distribution from the first. 20 C. 8 ; 59 I. C. 86 followed.

K. Sankara Sastri for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

The Chief Justice,
9th September. 1926.
S. A. No. 71 of 1924.

Transfer of Property Act, Ss. 122 *and* 123—*Document by which properties are dedicated to an idol, whether requires registration.*

The question whether a document by which certain properties are dedicated to an idol must be registered was referred to a Full Bench. *See* 13 M. L. J. 364.

C. Rama Row for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

The Chief Justice,
10th September, 1926.
S. A. No. 202 of 1924.

Civil Procedure Code, *O.* 34, *R.* 6—*Decree directing the defendant to pay the decree amount and in default directing the hypothecated property to be sold—Application for personal decree whether necessary.*

Where a decree in a suit upon a mortgage directed "that the defendants do pay" the decree amount to the plaintiff and then provided for the sale of the hypothecated properties, the decree is a personal decree and no application for another personal decree is necessary under O. 34, R. 6. It is only where the decree is in conformity with Form No. 4 of Appendix D of the Civil Procedure Code, that an application under O. 34, R. 6 would be necessary. The construction of the decree is a pure question of law and can be taken in second appeal though not raised in the Courts below. 38 M. 677 referred to.

B. Jagannadha Doss for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Reilly, J.
13th September, 1926. } C. R. P. No. 248 of 1925.

Provincial Insolvency Act (V of 1920), Ss. 28 (2) and 34 (2)—Transfer of Property Act, S. 65—Mortgagee paying arrears of revenue due upon the mortgaged property after the adjudication of the mortgagor as insolvent—Suit for recovery of the amount paid from the mortgagor and the Official Receiver—Maintainability.

The mortgagee paid arrears of revenue accrued due upon the mortgaged property after the mortgagor was adjudicated as insolvent. He brought a suit for recovery of this amount which he had paid from the mortgagor and the Official Receiver. The Lower Court held that the suit was not maintainable and the mortgagee must prove his claim in the insolvency.

Held, that the suit was maintainable as the arrears of revenue paid accrued after the date of the order of adjudication.

V. Suryanarayana for Appellant.

P. V. Rangaram for Respondent.

N. S.

Jackson, J.
13th September, 1926. } C. R. P. No. 238 of 1926.

Civil Procedure Code, S. 115 and O. VI, R. 17—Amendment of plaint—Amendment when a fresh suit for that relief would have been barred—Interference in revision.

In a suit for rent based upon a lease the defendant pleaded that as the lease-deed was not registered the claim must fail. After the statement was filed and before the trial commenced, the plaintiff applied for amendment of plaint by the addition of a prayer for the relief of damages for use and occupation. Such a suit would, on that date, have been barred. The District Munsif allowed the amendment.

Held, (1) the amendment ought not to have been allowed inasmuch as the effect of it was to deprive the defendant of the right accrued to him by virtue of the bar of limitation. 36 M. 378 distinguished and 33 Bom. 644 referred to; (2) that it was a fit case for interference in revision. 14 M. L. T. 588 distinguished.

S. Narayana Aiyangar for Petitioner.

A. S. Visvanatha Aiyar for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
14th September, 1926.

C. M. S. A. No. 142 of 1924.

Limitation Act, Art. 182 (5)—*Application by decree-holder auction purchaser for possession of properties under O.* 21, *R.* 95, *Civil Procedure Code, whether step-in-aid of execution—Pendency of execution petition whether necessary—Limitation Act, Art.* 138 *—Applicability when the decree-holder is himself the auction purchaser.*

An application by the decree-holder auction purchaser for possession of properties under O. 21, R. 95, Civil Procedure Code, can be a step-in-aid of execution within Art. 182 (5) of the Limitation Act. 24 M. 185 followed. 6 M. H. C. R. 304 distinguished. For such an application to be a step-in-aid of execution it is not necessary that the execution petition must be pending when the application is filed. Observations of Ayling, J. in 45 M. 466 dissented from. Article 138 of the Limitation Act does not contemplate suits by decree-holder auction purchasers; it only contemplates suits by stranger auction purchasers.

D. A. Krishna Wariar for Appellant.

T. S. Viswanatha Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
15th September, 1926.

C. M. A. No. 29 of 1925.

Civil Procedure Code, Ss. 11 *and* 47 *and O.* 21, *R.* 66—*Suit on mortgage—Prior mortgagee impleaded as defendant—His rights not put in issue—Decree—Execution application by defendant mortgagee under O.* 21, *R.* 66 *to show his mortgage as an encumbrance in the sale proclamation—Appeal*—Res judicata.

In a suit upon a mortgage the prior mortgagee was impleaded as the 4th defendant and he raised the prior mortgage in his favour. But no issue was framed as regards his rights. A mortgage decree was passed in the suit in favour of the plaintiff without declaring the rights of the prior mortgagee defendant. By this time the 4th defendant purchased the property in execution of his decree upon his mortgage. When the property was sought to be brought to sale in execution of the decree upon the mortgage, the 4th defendant applied to the Court under O. 21, R. 66, Civil Procedure Code, to stop the sale on the ground that he had become the owner or to amend the sale proclamation by stating that the property was subject to his mortgage decree. The Lower Court dismissed the application on the ground that his rights were not recognised by the decree. The 4th defendant appealed.

Held (1) that no appeal lay and the remedy of the 4th defendant was to file a suit; (2) that a fresh suit by the 4th defendant would not be barred by *res judicata.*

K. P. M. Menon and *B. Pocker* for Appellant.

S. Ranganatha Aiyar and *A. V. K. Krishna Menon* for Respondent.

N. S.

N R C

Odgers and Madhavan Nair, JJ.
16th September, 1926. } S. A. No. 1755 of 1922.

Land Acquisition Act, S. 6 (1)—" *Wholly or partly out of public revenues* "—*Payment of a trivial sum of one anna.*

The condition in the proviso to S. 6 (1) of the Land Acquisition Act that a compensation to be awarded for the property declared to be needed for a public purpose is to be paid, wholly or partly, out of public revenues, is satisfied by payment of a particle. It need not necessarily mean a substantial part. A payment of one anna by Government is not an evasion of these provisions of the section. 51 M. L. J. 338 dissented from. 3 A. C. 483 and 18 Cal. 99 distinguished.

K. Ramanatha Shenai for Appellant.

The Government Pleader for Respondent.

N. S.

Odgers, J.
17th September, 1926. } S. A. No. 183 of 1924.

Civil Procedure Code, O. 21, *R.* 2 (3)—*Uncertified adjustment of decree—Transfer of Property Act,* S. 53—*Burden of proof—Portion of the consideration utilised in discharge of a prior binding debt—Right of alienee to a charge for that portion.*

Under O. 21, R. 2, cl. 3, Civil Procedure Code, an uncertified adjustment of decree out of Court cannot be pleaded as a defence to an execution application. 38 Mad. 538 and 43 Mad. 760 referred to.

Where a transfer is vitiated as to part of the consideration by S. 53 of the Transfer of Property Act, the onus is on the transferee to prove that the transaction was entered into *bona fide* and for valuable consideration. 33 Mad. 334 followed. Where a transfer is set aside as being in fraud of creditors, it is not in all cases that the transferee is entitled to a charge to the extent it is made for real consideration. It will depend on the circumstances of each case. Where the transferee is *participis criminis* he is not entitled to a charge even though he might have discharged prior encumbrances. 30 Mad. 6 followed. 36 Mad. 29 and 19 L. W. 135 referred to.

T. R. Ramachandra Aiyar and *K. Venkateswara Aiyar* for Appellant.

C. S. Venkatachariar and *S. Sankara Aiyar* for Respondent.

N. S.

Odgers, J.
17th September, 1926. } S. A. No. 845 of 1923.

Contract—Sale of goods—Purchaser committing breach of contract—Suit for recovery of advance.

A purchaser of goods who has himself committed a breach of contract cannot bring a suit for recovery of money paid to the vendor as advance at the time of the contract. 4 M. and G. 898 and 19 All. 489 followed.

C. V. Anantakrishna Aiyar for Appellant.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ. *17th September*, 1926. — L. P. A. No. 81 of 1925.

Letters Patent, cl. 15—"Judgment"—Order of a Judge hearing a second appeal that a new issue should be framed and calling for a finding.

An order by a Judge hearing a second appeal by which a new issue is raised and a finding thereon called for from the Lower Court is not a "Judgment" within the meaning of clause 15 of the Letters Patent and is consequently not appealable.

T. V. Venkatarama Aiyar for Appellant.

B. Satyanarayana for Respondent.

N. S.

The Chief Justice and Curgenven, J. *19th September*, 1926. — O. S. A. No. 79 of 1925.

Civil Procedure Code, S. 146, O. 21, R. 16 and O. 22, R. 10—Death of applicant pending execution petition—Legal representative whether can be brought on record—Procedure to be followed.

Where pending an execution application, the applicant dies, there is no procedure for bringing on record the legal representative of the deceased in that application. The proper procedure is only to file an independent execution application under O. 21, R. 16. O. 22, R. 10 of the Civil Procedure Code does not apply as it relates only to "other cases of assignment, creation or devolution of interest" other than those contemplated in the preceding sections. Section 146 of the Code does not also apply.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Respondent.

N. S.

Jackson, J. *21st September*, 1926, — C. R. P. No. 789 of 1923.

Civil Procedure Code, S. 152—Suit for money claim—Compromise for a certain amount providing for the amount being charged on certain properties—Decree not providing for the charge in terms of the compromise—Decree passed under the old Code of Civil Procedure—Amendment of decree by the insertion of the clause for charge—Whether can be granted.

In a suit for money claim, the parties put in a compromise petition that a certain amount should be paid to the plaintiff and the same be charged upon certain immovable properties of the defendant. The Court passed a decree in terms of the compromise but the decree did not

provide for the charge. The decree was passed while the old C. P. Code of 1882 was in force. The plaintiff put in a petition for amendment of the decree by the insertion of the clause as to the charge.

Held (1) that under the old C. P. Code of 1882 it was doubtful whether in a suit for money claim a decree could be passed creating a charge upon immovable properties, though such a decree can be passed under the new C.P. Code of 1908, and consequently (2) the decree cannot be amended. 18 M. 410 ; 22 M. 214 ; 33 M. 102 ; 49 M. L. J. 490 ref.

N. Viswanatha Aiyar and *V. Chellamiah* for Petitioner.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. M. S. A. No. 45 of 1924.

Practice—Execution petition—Petition for amendment by inclusion of other properties for attachment after the expiry of 12 years from the date of the decree—Whether can be allowed.

An execution petition was put in for attachment and sale of certain properties just before the expiry of twelve years from the daté of the decree. Subsequently, after the expiry of 12 years from the date of the decree, a petition was put in for amendment of the execution petition by the inclusion of certain other properties for attachment and sale. The amendment was allowed by the Lower Court.

Held, that the order of the Lower Court must be set aside as no question of amendment arose in such a case, there being no defect in the original application. 27 M. L. J. 25 and 19 Q. B. D. 394 followed. 26 M. L. J. 83 referred to 45 M. L. J. 651 distinguished.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Appellant.

N. Viswanatha Aiyar for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. R. P. No. 343 of 1925.

Contract—Stranger to the contract—Right of suit on the contract—Surety paying off creditor—Rights of—Contract Act, S. 140.

A simple-creditor whose debt has been directed to be paid out of the consideration amount retained by the vendee from the debtor is entitled to sue the vendee for recovery of the amount. 38 M. 753 referred to. 43 M. L. J. 129, 41 C. 137 and 47 M. L. J. 517 followed. A surety who has paid off the credit of the debtor is entitled, on such payment, to stand in the shoes of the creditor and enforce all the remedies of the creditor as against the debtor and persons claiming under him. 21 W. R. 347 followed. *Drew* v. *Lockett*, 55 E. R. 196 referred to.

D. Ramaswami Aiyangar for Petitioner.

N. K. Mohanarangam Pillai for Respondent.

N. S.

Krishnan, J.
9th September, 1926. } C. R. P. Nos. 387 and 388 of 1925.

Madras Village Courts Act, S. 73—Misconduct—Allegation that notice of suit was not served and records were fabricated.

Allegations by a judgment-debtor in a decree of a village court who applies to the District Munsiff under S. 73 of the Village Courts Act that he was not served with notice of the suit and the records were fabricated amount to " misconduct " within S. 73 of the Act.

K. Bhashyam Aiyangar and *K. V. Srinivasa Aiyar* for Petitioner.

T. L. Venkatrama Aiyar for Respondent.

N. S.

Odgers, J.
14th September, 1926. } C. M. P. No. 2809 of 1926.

Civil Procedure Code, O. 41, R. 10—Dismissal of appeal for failure to furnish security for costs—Application to set aside the order of dismissal—Maintainability.

No application lies for setting aside an order rejecting an appeal for failure to furnish security for costs and restoring it to file. 19 M. L. J. 304 and C. M. P. No. 174 of 1925 followed.

C. Rama Rao and *P. V. Rangaram* for Petitioner.

K. Kameswara Rao for Respondent.

N. S.

Odgers, J.
15th September, 1926. } S. A. No. 185 of 1924.

Malabar Law—Property standing in the name of a junior member — Presumption — Karar — Strisothu *— Management by females.*

When property stands in the name of a junior member of a Malabar tarwad there is no presumption that the property is tarwad property when it is not shown that it was acquired out of tarwad funds. 23 L. W. 575 ; 39 M. L. J. 590 followed.

Quaere : Whether there can be a *Strisothu* tavazhi managed by females ?

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Devadoss, J.
21st September, 1926. } S. A. No. 1268 of 1924.

Civil Procedure Code, O. 41, R. 27 (2)—Additional evidence recorded with consent of parties—Recording of reasons by the Court—Necessity of.

The Appellate Court which allows additional evidence to be let in for the first time in the appeal must record its reasons for the same, even though the parties consent to the additional evidence being allowed to be let in.

N R C

Watrap S. Subramania Aiyar, K. Rajah Aiyar, V. Ramaswami Aiyar and *K. R. Rama Aiyar* for Appellant.

C. V. Anantakrishna Aiyar and *A. S. Viswanatha Aiyar* for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. R. P. Nos. 726 to 728 of 1925.

Decree—Execution—Amount paid into Court towards the decree—Attachment of, by another decree-holder—Validity—Payment of one decree-holder's claim whether a fraud on the other decree-holders.

Where the judgment-debtor pays the full decree amount into Court towards satisfaction of the decree, the amount cannot be attached by another decree-holder of the same judgment-debtor and the executing Court is bound to enter up satisfaction of the decree. The fact that one decree-holder alone is paid by the judgment-debtor will not constitute a fraud on the other decree-holders.

T. S. Anantaraman for Petitioners.

C. Unikanda Menon for Respondents.

N. S.

Devadoss and Sundaram Chetty, JJ.
22nd September, 1926. } C. M. A. No. 317 of 1924.

Insolvency—Adjudication of two persons as insolvents—Joint debtors—Same act of insolvency, whether necessary.

A petition to adjudicate two persons as insolvents is maintainable if they are joint debtors. It is not necessary that they must have committed the same act of insolvency. Williams on Bankruptcy, 13th Edition, page 186 referred to. The test is whether, treated as a suit, the petition would be bad for multifariousness.

In a case where the respondents, besides owing the same debt to the petitioner, were also partners, a petition to adjudicate them both as insolvents is maintainable. 44 M. 810 referred to.

B. Satyanarayana for Appellant.

B. Somayya for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
23rd September, 1926. } C. M. A. Nos. 307 of 1924 and 91 of 1925.

Provincial Insolvency Act (V of 1920), Ss. 53 and 28 (7)—Transfer more than two years before the order of adjudication but within two years before the date of presentation of the petition for adjudication.

A transfer by an insolvent effected within two years of the date of presentation of the petition for adjudication can be set aside under S. 53, even though it is more than two years before the date of the order of adjudication. 35 M. L. J. 296 followed. 49 Bom. 730 and

72 I. C. 433 dissented from. (1904) 1 K. B. 451 at 455, 46 C. 991, 42 A. 433, 42 C. 289 referred to.

K. Krishnaswami Aiyangar and *S. Ranganatha Aiyar* for Appellants.

B. Somayya for Respondents.

N. S.

Odgers and Curgenven, JJ. *24th September*, 1926. — L. P. A. No. 124 of 1924.

Pleader—Engagement by client for several cases—Suit by client against pleader's legal representatives for accounts—General agency—Limitation—Limitation Act, Art. 89.

A client engaged a pleader for several rent suits. He sued the pleader's legal representatives, after the pleader's death, for an account of moneys advanced to the pleader in connection with the rent suits.

Held (1) that there is no such thing as general agency between a pleader and his client. The contract of agency for each suit becomes complete on the execution of the vakalat for that suit and is terminated when that suit is ended. 14 Ch. D. 406 followed. Consequently the suit was barred in respect of the rent suits disposed of more than three years prior to the date of the suit; (2) that the death of the pleader did not give a fresh cause of action against his legal representatives so as to give a fresh starting point of limitation. 17 C. W. N. 5 and 25 All. 55 dissented from. 16 M. L. T. 614 followed. 23 M. 292 and 27 M. 243 referred to.

P. Chenchiah for *P. Venkatramana Rao* for Appellant.

S. Varadachariar and *V. Suryanarayana* for Respondent.

N. S.

Devadoss, J. *27th September*, 1926. — S. A. No. 1501 of 1923.

Civil Procedure Code, S. 35*—Costs—Successful defendant when can be deprived of costs—False evidence adduced on his side—Interference with order of costs in Second Appeal.*

Where a suit is wholly dismissed, the successful party should not be deprived of his costs on the ground that some of his witnesses gave false evidence, when the case cannot be said to have been unnecessarily protracted by the false evidence. Such an order of the Lower Court, though affirmed on appeal, must be set aside in second appeal as being contrary to principle.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant.

P. Satyanarayana for *A. Satyanarayana* for Respondent.

N. S.

Ramesam and Reilly, JJ. *27th September*, 1926. — A. S. No. 129 of 1923.

Mortgage—Suit on—Impleading of party setting up paramount title—Suit bad for multifariousness—Person properly impleaded raising a paramount title.

A person who sets up a paramount title in himself should not be impleaded as a party to a suit on a mortgage. If he is impleaded as a party, the suit is bad for multifariousness. 12 C. 414, 33 C. 425 and 38 A. 488 followed. 31 A. 11, 40 A. 584 and 30 C. L. J. 301 referred to.

Per *Ramesam, J.* (*Reilly, J.* contra).—If a person who is properly impleaded as a party to a mortgage suit raises a paramount title in himself, such a question must be decided in the suit. 15 C. W. N. 66 followed. 4 Rang. 214 not followed. 11 C. W. N. 284, 36 A. 567, 23 L. W. 664 referred to.

C. V. Anantakrishna Aiyar and *C. Unikanda Menon* for Appellant.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondent.

N. S.

Odgers and Curgenven, JJ.
27th September, 1926. } C. M. A. No. 320 of 1925.

Civil Procedure Code, S. 151 *and O.* 41, *R.* 23—*Remand under inherent power of Court and not under O.* 41, *R.* 23—*Appeal—Revision.*

No appeal lies from an order of remand made under the inherent power of Court and which does not fall under O. 41, R. 23 of the Civil Procedure Code. 37 M. L. J. 536 and 48 M. 713 followed.

No revision lies from such an order. 16 L. W. 515 followed. (1926) M. W. N. 48 explained and distinguished.

P. Kameswara Rao, Ch. Raghava Rao and *A. Sundaram Aiyar* for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Reilly, J.
28th September, 1926. } C. R. P. No. 189 of 1925.

Practice—Sub-Judge invested with Small Cause powers—Trial of suit of Small Cause value as original suit—Parties not raising objection—Appeal to District court—Maintainability.

The Subordinate Judge of Cochin tried a suit upon a pronote for Rs. 240 as an original suit and the parties did not take any objection to it. An appeal was filed to the District Judge against the decree dismissing the suit and it was allowed by the District Judge.

Held, on revision, that the notification of the High Court of Madras, dated 13th February, 1917, conferring upon all the Subordinate Judges in the Madras Presidency small cause powers in suits up to the value of Rs. 500 did not exempt Cochin Sub-Court and consequently no appeal lay to the District Judge and the order of the District Judge must be set aside. 33 M. 323 (F. B.) followed.

P. Govinda Menon for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Reilly, J.
28th September, 1926. } S. A. No. 494 of 1924.

Religious endowment—Idol—Suit on behalf of by a person not a manager or a trustee—Maintainability.

Where it is not suggested or proved that there was a trustee or manager acting for a temple, a suit on behalf of the idol to restrain the defendant from interfering with the temple wall instituted by the *Archaka* who was in charge of the temple keys and who was otherwise a fit and proper person, is maintainable. 52 C. 809 (P. C.) applied.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant

B. Jagannadha Doss for Respondent.

N. S.

Jackson, J.
29th September, 1926. } S. A. No. 284 of 1924

Malabar Compensation for Tenants' Improvement Act (I of 1900), *S.* 5—*Several defendants in a suit for redemption—Duty of Court to decide the amount of compensation due to each defendant.*

In a suit for redemption the Court must fix the amount of compensation due to each defendant separately. It is not enough if the total amount due to all the defendants is fixed and the defendants directed to settle among themselves the amounts due to each of them. The settlement of the claims is a condition precedent to the passing of a decree for redemption. 41 M. 960 distinguished.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
29th September, 1926. } C. M. A. No. 9 of 1926.

Civil Procedure Code, O. 39, *R.* 1—*Letters of administration in respect of properties situate in a foreign country granted by the foreign Court—Power of British Court to restrain person resident in British India from acting upon the Letters of administration.*

A British Court has got jurisdiction to restrain, by injunction, a person residing within its jurisdiction from acting upon letters of administration granted to him by a foreign Court in respect of properties movable and immovable situated in a foreign country.

V. Narayanan, T. M. Krishnaswami Aiyar and *K. S. Venkatrama Aiyar* for Appellant.

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
29th September, 1926.

C. M. S. A. No. 94 of 1924 and C. R. P. No. 803 of 1924.

Civil Procedure Code, O. 21, R. 91—Decree holder attaching third person's property by mistake and purchasing it himself—Mistake found out by decree-holder only after confirmation of sale—Sale whether void or must be set aside.

A decree-holder attached properties belonging not to the judgment-debtor but to a stranger by mistake and purchased it himself. He found out the mistake only after the sale was confirmed. Without putting in an application to set it aside under O. 21, R 91, Civil Procedure Code, he put in a petition to attach the properties of the judgment-debtor alleging that the previous attachment and sale were null and void and need not be set aside.

Held, that the attachment and sale were not null and void and must be set aside under O. 21, R. 91, Civil Procedure Code, within the period of limitation provided therefor and the same not having been done the decree cannot be executed again. Observations in 41 C. 590 (P. C.) were explained as being *obiter*.

8 M. 99, 30 M. 209 and 2 Pat. 829 referred to.

The fact that the decree-holder himself was the purchaser was held not to make any difference.

P. N. Marthandam Pillai and *N. Rama Aiyar* for Appellant.

R Krishnaswami Aiyangar for Respondent.

N. S.

Sundaram Chetty, J.
29th September, 1926.

S. A. No. 529 of 1924.

Limitation Act, Art. 149—*Adverse possession against Government—Erection of thatched shed on Natham Poramboke and enjoyment.*

Where a person erected a thatched shed on Natham Poramboke land, enclosed the site with a fence and enjoyed it as of right for a continuous period of over 60 years, *held*, that he acquired a title to the site by adverse possession. 16 Bom. 338, 21 M. 53 and 46 M. 866 referred to. 44 M. 883 (P. C.) discussed

The Government Pleader instructed by *C. V. Harihara Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

N. S.

Devadoss, J.
30th September, 1926.

S. A. No. 245 of 1924.

Madras Irrigation Cess Act (VII of 1865), S. 1 (a)—"River, stream, channel, tank or work belonging to Government"—Water from springs on Government land.

Water which springs up from underground on Government land cannot be said to be supplied from " any river, stream, channel, tank or work belonging to Government " within the meaning S. 1 (*a*) of Act VII of 1865. Where water arising from springs on Government

land was carried by a channel which was found by both the Lower Courts to have been dug by the ancestors of the ryotwari tenant and enjoyed by them for over 60 years and used for irrigation purposes, *held*, that the Government was not entitled to levy water tax.

The Government Pleader with *C. V. Harihara Aiyar* for Appellant.

V. S. Narasimhachar for Respondent.

N. S.

The Chief Justice, Jackson and Sundaram Chetty, JJ.
30th September, 1926.

C. R. P. No. 742 of 1926.

Civil Procedure Code, S. 115—Court—Chief Judge of the Small Causes Court acting under Rule 4 of the Rules framed under the Madras City Municipal Act— Whether persona designata—*Jurisdiction of Commissioner to go into the question of disqualification of election candidates.*

The Chief Judge of the Court of Small Causes acting under Rule 4 of the Rules framed by the Governor in Council under the Madras City Municipal Act of 1919 is *persona designata* and not a selected member of the Court chosen to represent it and consequently the High Court has no jurisdiction to entertain a revision petition against his order. 3 Ran. 560 followed. 47 Mad. 369 distinguished.

Quaere : Whether the Commissioner is invested by the Madras City Municipal Act of 1919 with the powers of enquiring into grounds of disqualification which do not appear on the face of the nomination paper of a candidate for election or whether he is only to decide objections arising out of the nomination paper itself, *i. e.*, whether the Act confines him to the purely ministerial functions. 13 A. C. 241 and (1904) 1 K. B. 74 referred to.

K. S. Krishnaswami Aiyangar and *K.S. Rajagopala Aiyangar* for Petitioner.

Vere Mockett, M. Damodaram Naidu and *S. Rangaswami Aiyangar* for Respondent.

N. S.

Devadoss, J.
1st October, 1926.

S. A. No. 255 of 1924.

Hindu Law—Joint family—Alienation by a co-parcener—Suit by the other co-parcener to recover possession of property alienated from the alienee—Right of alienee to have the property in his possession allotted to the share of the alienor.

A Hindu co-parcener in a joint family consisting of two persons alienated certain items of the joint family properties and gave possession of them to the alienee. Subsequently, all other items of the family properties were alienated by both the co-parceners to discharge joint family debts. The co-parcener who did not join in the first alienation brought a suit against that alienee to recover possession of the properties alienated by the other co-parcener. It was found by the Lower Courts that the share of the alienor would be worth much more than the value of the property alienated.

Held (1) that the alienee was entitled to the share of his alienor as on the date of the alienation and *not* as on the date of the suit. 35 M. 47 followed ; (2) that the alienee was entitled to retain the property alienated, as on the date of the alienation, the alienor's share in the family properties would have been more than the value of the property alienated. 46 M. 815 followed.

T. M. Ramaswami Aiyar for Appellant.

V. Ramaswami Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
1st October, 1926. — C. R. P. No. 653 of 1924.

Madras Hereditary Village Officers Act (III of 1895), S. 13 (1), proviso 2 and S. 21—Suit for emoluments of an office by the office-holder—Jurisdiction of Civil Court.

All suits for emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the Revenue Court. The Civil Court has jurisdiction only in one case, viz., where one of the issues is whether the emoluments are land or an assignment of revenue, and even that issue has first to be decided by the Revenue Court. 30 M. 126 and 30 M. 320 followed.

V. Thyagaraja Aiyar for Petitioner.

C. Narasimhachari and *M. E. Rajagopalachariar* for Respondent.

N. S.

Odgers and Curgenven, JJ.
1st October, 1926. — C. M. A. No. 331 of 1925.

Civil Procedure Code, O. 41, R. 23—Preliminary point—Suit for separate maintenance by a Hindu wife against her husband—Wife when entitled to separate maintenance.

In a suit by a Hindu wife against her husband for separate maintenance the Court framed the following issues, viz. : (1) Is the plaintiff entitled to maintenance and, if so, to what amount ? (2) Is the plaintiff entitled to any allowance for raiment ? (3) On what properties should the maintenance be charged ? The Trial Court dismissed the suit on the ground that the plaintiff was not entitled to claim maintenance, without recording a finding on the other issues. On appeal, the District Judge held that the plaintiff was entitled to maintenance, reversed the Trial Court's decree and remanded the suit for trial on the other issues. On appeal to the High Court from this order of remand, *held* (1) that an appeal lay as the decision of the Trial Court was on a preliminary point and the same was reversed by the District Court. 45 M. 900 followed. 12 L. W. 667 considered.

A Hindu wife is not entitled to separate maintenance on the ground of abandonment by her husband unless that abandonment implies a refusal to maintain her. Where a Hindu wife left her husband's house under circumstances which did not justify her so leaving the house and for considerable time there was no offer on the part of the wife to go and live with her husband, *held*, that she was not entitled to separate maintenance. 31 M. 338 followed.

A. Ramachandra Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

N. S.

Devadoss, J.
20th September, 1926. } S. A. No. 1874 of 1923.

Principal and agent—Sale of goods—Merchant consigning goods to commission agent to another place—Relationship between.

The legal relation between a merchant in one country and a commission agent in another is that of a principal and agent, and not that of a seller and buyer, though this is consistent with the agent and principal—when the agent consigns the goods to the principal—being in a relation like that of seller and buyer for some purposes. (1872) Law Reports, 5 H. L. 395, (1883) 11 Q. B. 797 referred to. 47 M. L. J. 312, 41 Mad. 1060 referred.

A. Krishnaswami Aiyar, Ch. Raghava Rao and *B. T. M. Raghavacharyulu* for Appellants.

V. Suryanarayana for Respondents.

N. S.

Devadoss and Sundaram Chetty, JJ.
20th September, 1926. } C. M. A. No. 314 of 1924.

Provincial Insolvency Act (V of 1920), S. 53—Application to set aside alienation of insolvent—Dismissal of—Right of individual creditor to appeal.

Where in an application by the Official Receiver to set aside an alienation of the insolvent under S. 53 of the Provincial Insolvency Act the Court refused to set it aside, an individual creditor has no right to come for the first time on appeal to the High Court, unless he first offers to indemnify the Official Receiver for the costs of prosecuting the appeal, and the Official Receiver declines to appeal in his own name. 47 Mad. 673 followed.

P. Somasundaram and *V. Krishna Mohan* for Creditor-appellant.

T. Ramachandra Rao for Official Receiver.

Ch. Raghava Rao, A. Sundaram Aiyar and *B. T. M. Raghavacharyulu* for Respondent-purchaser.

N. S.

Krishnan, J.
26th September, 1926. } C. R. P. No. 47 of 1925.

Civil Procedure Code, Sch. II, paras. 20 and 21—Procedure under—Formal order filing the award before pronouncing judgment in terms of it—Omission to pass—Material irregularity—Revision.

Where an application is made to have an award filed under para. 20 of Sch. II, Civil Procedure Code, the Court after being satisfied under para. 21 should, in the first instance, order that the award be filed, and then only it can proceed to pronounce judgment in terms of the award. The order that the award be filed is appealable whereas the judgment in terms of the award is not; and the action of the Court in passing judgment and decree without a formal order for filing the award is a material irregularity justifying revision as it deprives the parties of the valuable right of appeal.

N R C

P. V. Vallabhacharyulu for Petitioner.

Ch. Raghava Rao and *B. T. M. Raghavacharyulu* for Respondents.

N. S.

Jackson, J.
27th September, 1926. } C. R. P. No. 349 of 1925.

Madras Abkari Act (I of 1886), Ss. 12 and 13—Licence to sell toddy—Licensee a benamidar on behalf of four persons in partnership—Legality of the partnership—Pronote executed by one of the partners for monies advanced by the other partners—Validity of—Contract Act, S. 23.

Where a licence to sell toddy was obtained in the name of a benamidar on behalf of four persons in partnership, and a pronote was executed by one of the partners for monies advanced in the business by other partners, *held*, as the licence merely forbids sale, transfer or sub-lease and appointment of an agent, without the permission of the Collector, there is nothing either in the Abkari Act or in the terms of the licence to make a partnership on whose behalf at the inception the licence has been obtained, illegal *per se.*

Held also that the suit pronote does not come within the mischief of S. 23 of Indian Contract Act. 54 I. C. 45, 43 M. 141 distinguished.

Ch. Raghava Rao for Petitioner.

B. T. M. Raghavacharyulu for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
30th September, 1926. } C. M. A. No. 261 of 1924.

*Civil Procedure Code, S. 11—Prior suit by mortgagee on his mortgage against Official Receiver as representing the mortgagor—Decree—Subsequent application by the Official Receiver under S. 53 of the Provincial Insolvency Act to set aside the mortgage—*Res judicata.

A suit was instituted on a mortgage and as the mortgagor had been adjudicated an insolvent the Official Receiver was impleaded as the defendant. A decree was passed in the suit. Subsequently the Official Receiver applied under S. 53 of the Provincial Insolvency Act of 1920 to set aside the mortgage. *Held*, that the prior decision in the mortgage suit was not *res judicata* in the subsequent application. 48 M. 750 followed.

V. Suryanarayana for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Odgers and Curgenven, JJ.
1st October, 1926. } C. M. A. No. 314 of 1924 and C. M. P. No. 3287 of 1926.

Provincial Insolvency Act (V of 1920), S. 75 (c) and Sch. I—Order annulling voluntary transfer—Whether includes order

refusing to annul it—Leave to appeal—Application for—Court to which it should be made—Procedure.

In Schedule I of the Provincial Insolvency Act an order annulling the voluntary transfer does not include an order refusing to annul it. So an Official Receiver has first to obtain leave to appeal under S. 75 (*c*) of the Provincial Insolvency Act. Though leave can be granted by both the District Court and High Court, yet as a matter of practice application for leave to appeal has in the first instance to be filed in the District Court.

Where an appeal is filed without obtaining leave either from the District Court, or from the High Court and an application is made for the first time at the time of arguments, *held*, that the proper course in such a case is to direct the application to be made before the District Court alone. 33 I. C. 773 followed.

P. Somasundaram and *V. Krishna Mohan* for Appellant.

Ch. Raghava Rao, A. Sundaram Aiyar and *B. T. M. Raghavacharyulu* for Respondent.

T. Ramachandra Rao for the Official Receiver.

N. S.

Beasley, J.
1st October, 1926. } C. S. No. 130 of 1924.

Contract Act, S. 178—Entrustment of diamonds for inspection, valuation and return—Pledge of the diamonds—Pledgee whether protected.

Where the first defendant obtained from the plaintiff some diamonds for the purpose of inspection, valuation and return and the letter also stated that the value is so much per carat, and the first defendant pledged them the next day with the other defendants, and the plaintiff sought to recover them from these defendants : *Held*, that the transaction evidenced by the letter of inspection was a mere entrustment for a specific purpose and not a sale on credit basis ; that he had no such possession as is contemplated in S. 178 of the Contract Act so as to pass title by way of pledge and that the pledgee was not protected as there was want of good faith on his part. *Greenwood* v. *Holquett*, 12 Beng. L. R. 42 followed.

Vere Mockett, T.D. Srinivasachari and *T. Chakravarti Aiyangar* for Plaintiff.

Imamuddin for Defendant.

N. S.

The Chief Justice, Jackson and Sundaram Chetty, JJ.
1st October, 1926. } C. M. P. No. 3304 of 1926.

Certiorari, writ of—Jurisdiction of High Court to issue—Discretionary power—Application to issue writ to the Commissioner of the Corporation and Small Cause Court Chief Judge to call up

their orders invalidating the nomination paper of an election candidate—Applicant not raising the point of absence of jurisdiction before the Lower Court but arguing the case on the merits—Whether precluded from raising the point before the High Court.

In issuing a writ of certiorari, the High Court does not act under any statute but acts under the inherent power devolved upon it from the old Supreme Court of Madras. Consequently it stands, with regard to the prerogative rights, in the same position as the Court of King's Bench in England and follows the rules laid down by that Court in the decided English cases as to the scope and limitations of its jurisdiction. Where an applicant for a writ of certiorari to call up the orders of the Commissioner of the Corporation of Madras and the Chief Judge of the Small Cause Court holding that the nomination paper of an election candidate is invalid, on the ground that both the officers acted without jurisdiction, did not raise the point of absence of jurisdiction before the Lower Court but argued the matter on the merits.

Held, that the failure to object to the jurisdiction coupled with arguing the case on the merits before the Lower Court precluded the High Court from exercising the discretionary jurisdiction vested in the High Court in his favour. 29 L. J. (N. S.) M. C. 39, 29 L. J. (N. S.) M. C. 203, 32 L.J.M.C. 257, (1914) 1 K.B. 608, (1919) 2 K.B. 374 referred to.

K. S. Krishnaswami Aiyangar and *K. S. Rajagopala Aiyangar* for Petitioner.

Vere Mockett and *S. Rangaswami Aiyangar* for Respondent.

N. S.

Sundaram Chetty, J.
7th October, 1926.
S. A. No. 615 of 1924.

Limitation Act, Art. 144—*Adverse possession*—De facto *guardian's possession of minor's property—Whether adverse to the minor.*

The possession of a *de facto* guardian of a Hindu minor is in law the possession of the minor. Consequently he cannot, by using the properties of the minor, get a title by adverse possession. 30 M. 145, 35 B. 79 followed. 45 M. 361 distinguished.

Ch. Raghava Rao for Appellant.

K. Rajah Aiyar for Respondent.

N. S.

Srinivasa Aiyangar, J.
7th October, 1926.

In the matter of the Specific Relief Act and Madras City Municipal Act and In the matter of the Election of 29th Division, Royapettah.

Madras City Municipal Act (IV of 1919), S.55 (2)—Election—Time of holding—Whether limited to August and September only—Provision directory and not mandatory—Rules framed under the Act—Rules 5 and 6—Construction of—Notification under R.5—Three days' time whether necessary—"Governor in Council," whether means Governor acting with Ministers—Government of India Act, S. 46.

S. 55 (2) of the Madras City Municipal Act which provides that vacancies arising by efflux of time in the Office of Divisional Councillor shall be filled at ordinary election which shall be fixed by the Commissioner to take place on such days in the months of August and September next preceding the vacancies as he thinks fit, is merely directory and not mandatory. It cannot be said that there is no power to hold the election in October.

Rule 5 of the Rules framed by the Government under the City Municipal Act does not merely create a contingent power in the Governor in Council but provides for the exercise of the power recognised to exist in the authority on one of the occasions in which such exercise becomes necessary. The rule does not contemplate only one fresh date being fixed by the Governor in Council but a series of fresh dates from time to time or as occasion may require.

The three days referred to in R. 5 are the three days indicated in R. 6 and not any different period of time. R. 6 is not one of the rules which can be dispensed with under the provisions of R. 5. Hence at least three days' notice of the election should be given as provided in R. 6 even in respect of an election for which a fresh date is fixed under R. 5.

The words " Governor in Council " in R. 5 should be read as the Governor acting with Ministers as provided in S. 46 of the Government of India Act.

N. Chandrasekhara Aiyar, V. C. Gopalarathnam and *S. Parthasarathi* for Petitioners.

S. Rangaswami Aiyangar and *D. Chakrapani Aiyangar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
8th October, 1926.

S. A. No. 1803 of 1923.

Limitation Act, Art. 132—Suit on first mortgage and decree thereon—Payment of the decree amount by the second mortgagee—Suit by the mortgagor for redemption of the second mortgage—Second mortgagee defendant claiming right of subrogation to the first mortgage—Limitation.

A suit was instituted on a first mortgage and a decree was obtained. Before the properties were brought to sale in execution of the decree, the second mortgagee paid off the decree amount. More than

three years after the date of this payment and twelve years after the date when the amount on the first mortgage became due and payable the mortgagor brought a suit for the redemption of the second mortgage. The second mortgagee defendant claimed that he should be also paid the decree amount in the first mortgagee's suit which he had paid off on the ground that he was entitled to it by subrogation.

Held, that his subrogation right would have been barred on that date and that therefore he cannot claim the payment of that amount.

A puisne mortgagee who pays off a prior mortgage acquires all the rights of the prior mortgagee as such under S 74 of the Transfer of Property Act and the fact that a decree was obtained on the prior mortgage when the payment was made does not make any difference. The period of limitation within which the puisne mortgagee can enforce the rights of the prior mortgagee to which he has become entitled is the same as that for a suit on the prior mortgage itself. 39 C. 527 (P. C.) followed. 44 A. 67 and 47 M. L. J. 316 not followed. 27 A. 325 (P. C.) and 68 I. C. 707 referred to.

K. Subba Rao for *V. Ramadoss* for Appellant.

B. Somayya for Respondent.

N. S.

Curgenven, J.
8th October, 1926. } Cr. R. C. No. 135 of 1926.

Criminal Procedure Code, S. 526 (8)—Adjournment of case—Award of costs—Legality of.

There is no provision in the Criminal Procedure Code for the award of costs when a criminal case is adjourned under S. 526 (8) of the Criminal Procedure Code.

J. C. Adam (Public Prosecutor) for the Crown.

P. N. Appusami Aiyar for Accused.

N. S.

Sundaram Chetty, J.
11th October, 1926. } C. R. P. No. 329 of 1925.

Civil Procedure Code, S. 115 and O. 33, R. (5) (d)—Application to sue in forma pauperis*—Rejection of—Revision—Duty of Court to confine itself to the petition.*

A revision lies to the High Court against an order of the District Munsif rejecting an application to sue in *forma pauperis* under O. 33, R. 5 (*d*) of the Civil Procedure Code. 13 M. L. J. 292 (F. B.), 41 Mad. 620, 18 L. W. 53 referred to. 44 A. 248 not followed.

A Court acts without jurisdiction if it travels beyond the four corners of the petition to determine whether it discloses a cause of action or not.

Where the District Munsif surmising that an agreement referred to in the petition but not filed would be inadmissible in evidence, rejected the petition under O. 33, R. 5 (*d*) of the Civil Procedure Code, *held*, on revision, that the order must be set aside, as the validity

or otherwise of the agreement was a matter to be determined only at the trial.

V. Viyanna for Petitioner.

K. Venkatrama Raju for Respondent.

N. S.

Wallace and Madhavan Nair, JJ. *11th October, 1926.* R. T. No. 64 of 1926.

Criminal Procedure Code, S. 288—Evidence Act, S. 6—Statements made by eye-witnesses to others immediately after the occurrence— Admissibility—Criminal Procedure Code, S. 164—Statement before the committing Magistrate, whether can be used as substantive evidence.

A statement made by a prosecution witness before the committing Magistrate can only be used for the purpose of contradicting the witness and cannot be used as substantive evidence.

Statements made by an eye-witness to others immediately after the occurrence are admissible under S. 6 of the Evidence Act.

V. L. Ethiraj and *K. G. Srinivasa Aiyar* for Accused.

J. C. Adam for the Crown.

N. S.

Odgers and Jackson, JJ. *12th October, 1926.* C. M. A. No. 510 of 1925.

Succession Certificate Act, S. 4—Amount due under an insurance policy—Whether a debt.

The amount due under an insurance policy payable at the age of 55 or death is a " debt " within the meaning of S. 4 of the Succession Certificate Act.

K. Srinivasa Rao for Appellant.

N. S.

Ramesam, J. *12th October, 1926.* S. A. No. 1606 of 1923.

Registration Act, Ss. 21 and 22 and R. 17—Description of property—Sufficiency of.

A partition deed provided that " the properties purchased in the name of our aunt as our natural guardian in the villages of *S* and *P* shall be divided between us in equal halves." *Held*, that the description of the properties was sufficient for the purposes of registration of the document. The fact that the survey numbers were not mentioned was immaterial.

If a notification under Section 22 (1) provides that in certain districts the description shall be in a certain manner and does not give any further direction, the proviso under clause 2 will have effect of entitling a document to be registered provided the description is sufficient to identify the property. The word " practicable " in S. 21 (3) means practicable with reference to the parties. 16 L. W. 287 referred to. 24 L. W. 375 at 377 followed.

K. Bhashyam Aiyangar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for Respondent.

N. S.

Odgers and Curgenven, JJ. *13th October, 1926.* — C. M. A. No. 386 of 1925.

Civil Procedure Code, S. 92 — Decree directing trustee to pay monies—Whether can be passed in a suit under the section—Appeal to High Court—Taking of security by the Lower Court pending the appeal—Whether ultra vires—*Enforceability of security in execution—Civil Procedure Code, S. 145 — Covenant by the surety to pay interest—Enforceability of.*

In a suit under S. 92, Civil Procedure Code, for the framing of a scheme, for removal of the trustee and for accounts, the Court found that a certain sum had to be accounted for by the trustee-defendant and passed a decree "that the trustee-defendant *shall be liable* to make good to the temple the amount". The trustee-defendant appealed to the High Court and after the preferring of the appeal when the decree was sought to be executed in the Lower Court, execution was stayed by the Lower Court on the appellant furnishing security pending the appeal. The High Court confirmed the Lower Court's decree in the appeal. The decree was then sought to be executed.

Held, (1) that the decree was not a mere declaratory decree but one capable of execution, 36 C. L. J. 101 referred to ; (2) that such a decree could be passed in a suit under S. 92, Civil Procedure Code, 14 L. W. 238, 28 I.C. 886 referred to ; (3) that, where the decree is ambiguous, it could be construed in the light of the pleadings and the judgment, 31 I. C. 478, 33 I. C. 561 referred to ; (4) that the taking of the security by the Lower Court while the appeal was pending in the Lower Court was not *ultra vires* of the powers of the Lower Court, 2 I. A. 219, 7 M. 400, 5 C. 27, 48 M. L. J. 121 referred to. 35 A. 119 distinguished ; (5) that the security bond could be enforced in execution, 45 A. 649, 41 M. 327 referred to ; (6) that the surety could be compelled to pay interest which he had covenanted to pay, though the decree did not direct it.

A. C. Sampath Aiyangar for Appellant.

S. T. Srinivasagopalachari and *A. V. Viswanatha Sastri* for Respondent.

N. S.

Odgers and Jackson, JJ. *13th October, 1926.* — C. R. P. No. 294 of 1925.

Madras Local Boards Act, S. 228—Bona fide *assessment—Jurisdiction of Civil Court to interfere with.*

Where there has been a *bona fide* assessment by a Taluk Board and no malice is alleged against the Board, the assessment cannot be questioned in a Civil Court.

P. V. Rangaram for *Sir K. V. Reddi* for Petitioner.

N. Sivaramakrishna Aiyar for Respondent.

N. S.

Reilly, J.
5th October, 1926. } C. R. P. No. 354 of 1925.

Civil Procedure Code, S. 115—Other remedy available—Interference in revision—Personal decree against Hindu widow—Judgment directing decree against the assets of husband—Attachment of husband's assets in execution—Objection by the daughters.

An attachment of certain properties of the husband as assets in the hands of the widow was made in execution of a decree which had been passed personally against her, though the judgment had directed a decree against the assets.

Objection was made by the daughters of the last male-holder to the attachment whereupon the Court directed the attachment to be withdrawn except as to the life-interest of the widow which was all that could be attached under the decree so long as the decree had not been sought to be brought into conformity with the judgment by an application under Section 152, Civil Procedure Code.

On revision, *held*, that the High Court should not interfere with the order of the Lower Court, there being a separate remedy available to the attaching decree-holder by way of a suit under O. 21, R. 63.

Quaere : Whether the daughters who have only a *spes succcssionis* during their mother's life time have an 'interest' in the properties attached to entitle them to apply under O. 21, R. 58.

K. Balasubrahmania Aiyar for Petitioner.

Ch. Raghava Rao for Respondent.

N. S.

Sundaram Chetty, J.
6th October, 1926. } C. R. P. No. 363 of 1925.

Provincial Small Cause Courts Act, Sch. I, Art. 15—Contract—Suit for refund of advance paid—Whether a suit for specific performance.

A suit for refund of moneys paid by one person to another on account of that other's breach of contract is not a suit for specific performance within Art. 15, Sch. I of the Provincial Small Cause Courts Act and is as such cognizable by a Court of Small Causes.

K. Balasubrahmania Aiyar for Petitioner.

Ch. Raghava Rao for Respondent.

N. S.

Devadoss, J.
8th October, 1926. } S. A. No. 1880 of 1923.

Defamation—Qualified privilege—Relevant matters—Actual malice—Proof of.

A party is entitled to qualified privilege in respect of statements contained in a reply to a registered notice which are relevant to the matter raised by the notice and no action for defamation can lie against him unless actual malice is proved.

N. Rama Rao for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

NRC

Odgers, J. *10th October*, 1926.	S. A. No. 477 of 1924.

Civil Procedure Code, S. 64—Decree-holder consenting to the private alienation by the judgment-debtor—Whether estopped from questioning the sale.

The terms of S. 64, C. P. Code, are imperative and there can be no estoppel as against a decree-holder who consents to a private sale of the properties by the judgment-debtor subsequent to his attachment, such a sale being not merely voidable, but altogether void as against all claims enforceable under the attachment. Such a decree-holder is accordingly entitled to proceed against the properties then sold.

T. R. Arunachela Aiyar for *B. Somayya* for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Curgenven, J. *14th October*, 1926.	C. R. P. No. 401 of 1924.

Civil Procedure Code, S. 152—Decree in conformity with judgment—Whether can be amended.

A Court has power to amend its decree by rectifying a mistake even though the decree is in conformity with the judgment. 14 L. W. 445, (1914) M. W. N. 107, 16 A. L. J. 149, 18 A. L. J. 501, 22 A. L. J. 215, 28 C. W. N. 873 referred to. 3 L. W. 499 distinguished.

P. S. Ramachandra Aiyar for *P. S. Narayanaswami Aiyar* for Petitioner.

C. Unikanda Menon for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J. *14th October*, 1926.	S. A. No. 1349 of 1923.

Contract—Stranger to the contract—Right to sue on the contract—Award based on agreement of parties, whether a contract.

A person who is not a party to a contract can sue on the contract in exceptional cases. The English doctrines that a stranger to a contract cannot sue upon it should be applied in India only with flexibility. 32 A. 410 (P. C.) referred to. A judgment by consent will operate as a contract. Where the parties agree before the arbitrators about their disputes and an award is passed by them in terms of the agreement, it is a misnomer to call it an award. It is really an agreement of the parties and consequently a person who is not a party to it can sue upon it. 6 A 322 (P. C.) distinguished.

T. A. Vijiaraghavachari for Appellant.

V. Ramasami Aiyar for *K. Rajah Aiyar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ. *14th October*, 1926.	C. M. S. A. No. 102 of 1924.

Civil Procedure Code, O. 21, R. 53 (6)—Notice under, whether necessary before attachment is complete.

Their Lordships referred to a Full Bench the question whether a notice under O. 21, R. 53 (6) of the Civil Procedure Code is necessary before an attachment under that rule is complete. 24 M. L. T. 495, 13 L. W. 34 referred to.

B. Somayya and *E. Krishnamurthi* for Appellant.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondent.

Jackson, J.
14th October, 1926. } Cr. Rev. Case No. 585 of 1926.

Practice—Criminal trial—Summary case—Plea of guilty on charge of theft—Sentence pronounced but judgment written later from memory—Propriety of.

The accused was put up for trial on a charge of theft before a first class Bench of Magistrates. The case was tried under the summary procedure and on a plea of guilty by the accused, he was sentenced to 2 months' rigorous imprisonment in open Court. No judgment was delivered then, and subsequently when the accused applied for a copy of the judgment, the Chairman of the Bench wrote a judgment from memory, there being no record of evidence. *Held*, the procedure was illegal.

M. C. Sridharan for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Curgenven, J.
18th October, 1926. } Cr. Rev. Case No. 686 of 1926.

Criminal Procedure Code, S. 259—Dismissal of complaint—Subsequent application for restoration—Duty of Court.

A complaint was dismissed under S. 259, Cr. P. Code. Subsequently an application was put in by the complainant for restoration with a fresh complaint and the Magistrate took the case on file. *Held*, the proceedings were quite proper, as amounting either to a rehearing of the original complaint or taking on file the second complaint. 29 Mad. 126 (F. B.) applied ; 18 M. L. J. 561 followed.

V. Suryanarayana for Petitioner.

T. S. V.

Jackson, J.
18th October, 1926. } S. A. No. 215 of 1924.

Malabar Compensation for Tenants' Improvements Act, Ss. 5 and 19—Kushikanom of 1884 from Jenmi—Rates fixed for compensation—Subsequent kanom of 1903—Lessee attorning to kanomdar in 1905, agreeing to rates of compensation as fixed in 1884—Kanom and kushikanom rights becoming vested in third party—Suit for redemption of kanom of 1903—Compensation at what rate to be payable—Contract rate or Act rate.

A *Jenmi* in Malabar granted a *kushikanom* lease of certain properties in 1884 and the *marupat* recited that compensation for improvements was to be paid for at a certain rate. In 1903 the *Jenmi* granted a *kanom* of the same properties and in 1905 the heirs of the *kushikanom* lessee attorned to the *kanomdar* direct, agreeing to receive the same rates of compensation as fixed in the *marupat* of 1884. Sub-

sequently as a result of a series of assignments, both the *kanom* and *kushikanom* rights became vested in defendants 2 to 8 in the year 1919. A *melkanomdar* from the *Jenmi* sued the defendants for redeeming the *kanom* of 1903 and claimed to pay compensation for the improvements effected between 1884 and 1905 at the rates fixed in the *marupat*, while the defendants claimed the rates payable under Madras Act I of 1900. *Held*, S. 19 of the Act made the contract in the *marupat* of 1905 unenforceable, and the tenants were entitled to the full rates of compensation as provided in the Malabar Compensation for Tenants' Improvements Act.

S. Ranganatha Aiyar for Appellant.

T. S. Viswanatha Aiyar and *D. A. Krishna Variar* for Respondent.

T. S. V.

Ramesam and Reilly, JJ. 18*th October*, 1926. } C. R. P. No. 678 of 1922.

Landlord and tenant—Tenant-in-common—Liability for the rent of the whole land—Dharmasanam grants.

A tenant-in-common is liable to the landlord for the entire rent, as there is a privity of estate between him and the landlord as regards the entire land. But if there is division between the several tenants-in-common by metes and bounds or if the lands are held by them in physical severalty, each one of them will be liable only for the proportionate share of the rent on his holding. 1913 (1) K. B. 469 and 53 Cal. 197 referred to.

The same principle applies in the case of Dharmasanam grants also.

K. V. Sesha Aiyangar for Petitioner.

K. Kuttikrishna Menon for Respondent.

N. S.

Curgenven, J. 19*th October*, 1926. } Cr. Rev. Case No. 163 of 1926.

Madras District Municipalities Act (V of 1920), Ss. 3 (24) (a), 317 (a) and (c)—Reconstruction—What is—Prosecution for commencing without permission of Chairman—Plea of limitation—Conviction under S. 317 (c)—Propriety of.

The accused was charged for an offence under S. 317 (*a*) of the Madras District Municipalities Act in that he commenced re-construction of a building without the permission of the Chairman. The plea was that the complaint was time barred under S. 347, as part of the re-construction had been commenced more than 3 months prior to the complaint and that there was no re-construction within the definition in S. 3 (24) (*a*). The Court below held that the definition of "re-construction" in the section was not exhaustive but held that S. 317 (*a*) would not apply and altered the conviction to one under S. 317 (*c*). *Held*, in revision, that S. 317 (*c*) was not applicable as it applies only to cases where the commencement of re-construction is legal, but it is "carried on or completed" in an illegal way. Scope of Ss. 3 (24) (*a*), 317 (*a*) and 317 (*c*) considered.

V. Suryanarayana for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Sundaram Chetty, JJ.
19th October, 1926.

L. P. A. No. 205 of 1925.

Hindu Law—Joint family—Father—Decree against—Execution—Sale—What interest passes—Admissibility of extraneous evidence—Judgment-creditor not defining the share of the father—Civil Procedure Code, O 21, R. 13.

In determining what interest passes to the purchaser at a sale in execution of a decree against the father of a joint Hindu family, extraneous evidence ought not to be allowed to find out the intention of parties as to what was intended to be sold, when the sale certificate itself is clear and free from ambiguity. 44 M. 483 (P. C.) followed.

Where the judgment-creditor does not define the share or interest of the judgment-debtor (father) as he is bound to do under the provisions of O. 21, R. 13, C. P. Code, it must be taken that the property in its entirety as described in the sale proclamation and in the sale certificate was intended to be sold.

S. Varadachariar and *C. A. Seshagiri Sastri* for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondent.

N. S.

Sundaram Chetty, J.
19th October, 1926.

C. M. S. A. No. 35 of 1925
and
C. R. P. No. 545 or 1925.

Madras Estates Land Act, Ss. 189 *and* 192*—Decree in rent suit—Application for execution—Appeal—Maintainability—Civil Procedure Code, S.* 47.

Orders passed on applications for execution of decrees passed in rent suits under the Madras Estates Land Act are appealable, as S. 47 of the C. P. Code is not one of the sections excepted under S. 192 of the Act.

Where the District Judge held that an appeal did not lie from such an order and dismissed the appeal, a second appeal lies to the High Court against the order of the District Judge.

P. Chenchiah for *P. Venkatramana Rao* for Appellant.

Respondent unrepresented.

N. S.

Waller, J.
20th October, 1926.

S. A. No. 1127 of 1925.

Madras Forest Act (*V of* 1882), *S.* 66*—Lease of right to collect forest produce—Lease amounts payable in four equal instalments—Second instalment not paid—Notice by Government—Right of Government to proceed under S.* 66.

Under a lease of the right to collect forest produce the lease amount was made payable in four equal instalments. The second instalment was not paid and the Government gave notice to the lessee that he should not collect forest produce till the arrear was paid. Subsequently the Government realised the amount by bringing the properties of the

lessee to sale under S. 66. *Held*, the contract of lease not having been cancelled, the amount due was money "payable on account of forest produce" within S. 66 and Government had the right to bring the properties to sale as if the amount due was an arrear of land revenue. 24 M. L. J. 426 distinguished.

A. C. Sampath Aiyangar for Appellant.

The Government Pleader and *T. L. Venkatrama Aiyar* for Respondents.

N. S.

Wallace and Madhavan Nair, JJ.
21st October, 1926. — C. M. A. No. 416 of 1924.

Civil Procedure Code, O. 9, R. 9 and O. 17, Rr. 2 and 3—Proof of sufficient cause for non-appearance—Duty of Court to restore suit—Default in paying batta and filing witness list—Whether case falls under O. 17, R. 3.

What under O. 9, R. 9 C. P. Code, the Court has to consider is whether there was sufficient cause for plaintiff not appearing on the day fixed for hearing. If such sufficient cause is shown the Court is bound to restore the suit and it is no answer to the application for restoration to say that the party had been guilty of failure to pay batta and to file a list of witnesses as directed by the Court. Such default on the part of the plaintiff does not bring the case under O. 17, R. 3 and the case remains as one under O. 17, R. 2 owing to the plaintiff's non-appearance on the day fixed for hearing and the Court is bound to dispose of the suit in the mode directed in that behalf by O. 9, R. 9, C. P. Code.

Ch. Raghava Rao for Appellant.

K. Ramamurthi for *K. Kameswara Rao* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
21st October, 1926. — C. M. A. No. 378 of 1924.

Court Fees Act, S. 19 (i) and Sch. I, Art. 11—Will by the father of joint Hindu family—Application for probate by son—Probate duty payable.

The father of a Hindu joint family executed a will bequeathing some of the joint family properties to certain persons and the rest to his three sons. An application for probate of the will was filed by the sons. *Held*, the Court-fee payable must be calculated on the value of the one-fourth share to which the father would be entitled. 33 Mad. 93 followed.

V. Govindarajachari for *A. Krishnaswami Aiyar* for Appellant.

The Government Pleader for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
26th October, 1926. } A. S No. 434 of 1924.

Hindu Law—Widow—Maintenance—Rate of—How fixed—Arrears of maintenance—If demand necessary—If right to arrears is a legal right.

The rate of maintenance to be awarded to the widow of a deceased co-parcener in a joint Hindu family is in the discretion of the Court to be fixed with reference to the income of the family and the needs of the widow, the only limit being that in no event should she be allowed a rate which would exceed the income from her husband's share of the family properties.

As for past maintenance, no demand is necessary to entitle her to it. Mere non-payment of maintenance to a person entitled thereto constitutes *prima facie* proof of wrongful withholding. 24 Mad. 147 (P. C.) and 21 M. L. J. 706 and 482 followed.

It is a legal right and the co-parceners cannot escape liability unless adequate grounds are shown for inferring that she had waived or abandoned that right.

Vere Mockett instructed by *K. S. Desikan* for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N. S.

Odgers and Jackson, JJ.
26th October, 1926. } A. S. No. 135 of 1923.

Grant—Subsequent inam statement and inam proceedings—Conflicting or inconsistent statements—Evidentiary value.

Where the original grant of some properties to a person makes it clear that the grant was of the fee simple without being burdened with any trust, an erroneous description of the properties by parties before the Inam Commissioner as trust properties and the consequent confirmation of the inam as Devadayam will not alter the nature of the property from that of being fee simple to that of being burdened with a trust. In the case of a conflict between the original grant and the inam title deed the former will prevail when the terms are clear and unambiguous. 44 Mad. 421 (P. C.) followed. 39 Bom. 69 distinguished.

P. R. Ganapathi Aiyar for Appellant.

T. R. Ramachandra Aiyar and *B. Vinayaka Row* for Respondent

N. S.

The Chief Justice.
26th October, 1926. } A. S. No. 434 of 1922 and A. S. No. 279 of 1923.

Specific Relief Act, Ss. 14 *to* 17—*Lease for* 99 *years—Covenant for renewal—Assignee of portion of the leasehold properties—Suit for specific performance—Maintainability.*

A lease for 99 years contained a stipulation that the said lease " should and might be renewed for a further term of 99 years upon such terms and conditions as should be judged reasonable ". A portion of

N. R. C.

the leasehold properties was assigned by the lessee and the lessee brought a suit for specific performance of the covenant for renewal.

Held (agreeing with *Venkatasubba Rao, J.*, who differed from *Krishnan, J.*) (1) the covenant for renewal was certain and definite and not vague, and (2) the suit by the assignee of the portion of the leasehold properties was maintainable. 52 C. 335 (P. C.) distinguished. (1838) 8 L. J. C. P. 59 : 132 E. R. 981 followed.

The Government Pleader for Appellant.

R. N. Aingar instructed by Messrs. *King* and *Patridge* for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
27th October, 1926.

O. S. A. No. 15 of 1926.

Presidency Towns Insolvency Act, S. 55—"*Transfer*"—*Agreement to dissolve partnership with a view to defraud creditors.*

An agreement entered into between the partners of a partnership business by means of which the whole business with all its assets and liabilities was transferred to one of them who was afterwards adjudicated an insolvent and the others were released of all their obligations to the partnership and were each paid a certain sum of money in addition amounts to a "transfer" within the meaning of S. 55 of the Presidency Towns Insolvency Act.

K. Ramanatha Shenai instructed by *V. Krishnan* for Appellant.

S. Duraiswami Aiyar instructed by *Messrs. Atkinson & Co.* for Respondent.

N. S.

Odgers and Jackson, JJ.
27th October, 1926.

C. M A. No. 275 of 1926.

Civil Procedure Code, S. 151 *and O.* 47, *R.* 1—*Execution application—Dismissal for default—Power of executing Court to restore it to file.*

An executing Court has no power to restore to file an execution application dismissed for default of the appearance of the decree-holder. Such an order cannot be supported as coming within the purview of O. 47, R. 1, as the words "for any other sufficient reason" must be read *ejusdem generis* with the previous clauses. Nor can it be supported as coming within the purview of S. 151, as the order of dismissal does not prevent a fresh application for execution being filed. The fact that a fresh execution application would be barred by limitation is no ground for exercising the inherent powers under S. 151. 51 M. L. J. 219 followed. 3 L. 27 (P. C.) referred to. 2 L. 66 dissented from.

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

N. Chandrasekhara Aiyar for Respondent.

N. S.

Curgenven, J.
28th October, 1926.
Cr. Rev. Case No. 329 of 1926.

Criminal Procedure Code, S. 540—Examination of persons as Court witnesses without previous notice to the parties—Legality—Evidence Act, S. 112—Sambandam in Malabar.

In a petition for maintenance under S. 488 of the Cr. P. Code, after the evidence on behalf of the petitioner and the counter-petitioner was taken the Magistrate, without giving previous notice to the parties, called four people of the village and examined them as Court witnesses. The Magistrate based his judgment on the evidence of the Court witnesses *alone* and found that the counter-petitioner was the father of the child and ordered maintenance.

Held (on revision) that the powers conferred by S. 540 should not be exercised at the behest of any party and consequently the order should be set aside. 12 A. L. J. 15 and 37 C. L. J. 173 followed.

Quaere: Whether a Sambandam is a valid marriage so as to invoke the principle of S. 112 of Evidence Act regarding the paternity of the child ?

P. Govinda Menon for Petitioner.

A. Sivarama Menon for Respondent

N. S.

Curgenven, J.
28th October, 1926.
Cr. Rev. Case Nos. 278, 364 and 418 of 1926.

Criminal Procedure Code, S. 247—Complainant absent—Dismissal of complaint and acquittal of accused—Subsequent order of Magistrate restoring complaint to file—Validity of—Revision.

A complaint was dismissed by a magistrate under S. 247, Cr. P. Code, as the complainant was absent and the accused was acquitted. On application by the complainant, the Magistrate restored the complaint to file.

Held (on revision) that the order of acquittal was legal when it was passed and the order restoring the complaint to file was *ultra vires*. 38 M. 1028 and Cr. Rev. Case No. 772 of 1925 followed. Powers of the High Court in revision against orders under S. 247 considered.

K. Kameswara Row for Complainant.

V. Suryanarayana for Accused.

N. S.

Waller, J.
28th October, 1926.
S. A. Nos. 479 and 480 of 1925.

Madras Estates Land Act, Sch. A, Art. 8—Limitation Act, Art. 116—Suit to recover rent due under a registered lease under the Estates Land Act—Period of limitation.

The period of limitation for a summary suit instituted by the landlord to recover rent from the tenants due under a registered lese under the provisions of the Madras Estates Land Act is not six years under Art. 116 of the Limitation Act, but three years under Art. 8 of Sch. A of the Madras Estates Land Act.

R. Kuppuswami Aiyar for Appellant.

J. A. Pinto for Respondent.

N. S.

The Chief Justice and Beasley, J.
19th October, 1926.

C. S. No. 324 of 1925.

Letters Patent (Madras High Court) Clause 12—Cause of action arising partly out of Madras—Suit in Madras—Leave to sue not obtained—Jurisdiction of High Court—" Dwell, carry on business, personally work for gain "—Meaning of.

Some gold threads were seized at Cuddalore by the Customs Officer of the Cuddalore circle as having been smuggled, in pursuance of an order of confiscation passed by the Collector of Madras. A suit was filed against the Secretary of State for India in the High Court of Madras (original side) for the recovery of them on the ground that duty had been paid for the goods. No leave to sue was obtained.

Held, that the goods having been seized at Cuddalore, part of the cause of action arose there and the mere fact that the order of confiscation was passed by the Collector of Madras did not show that the entire cause of action arose at Madras. The word " dwell " in clause 12 applies only to an individual and not to legal persons like the Secretary of State. The words " carry on business " apply only to cases of *Commercial* business and do not comprise the carrying on of the Government business.

K. Narasimha Aiyar for Plaintiff.

The Advocate-General for Defendant.

N. S.

Curgenven, J.
28th October, 1926.

C. R. P. No. 875 of 1925.

Civil Procedure Code, O. 9, R. 13—Compromise Decree—One of the parties ex parte *at the time of the compromise—Application by him to set aside the* ex parte *decree—Power of Court to set it aside.*

In a suit against 3 defendants, defendants 2 and 3 were *ex parte* and the 1st defendant compromised the suit. Subsequently the 2nd defendant applied for setting aside the *ex parte* decree and it was set aside so far as he was concerned. The Plaintiff applied in Revision to the High Court that the decree in its entirety ought to have been set aside even as against the 1st defendant who had compromised, as otherwise, there would be inconsistent decrees.

Held, that the fact that the decree was a compromise decree as against the first defendant was no bar to the application of the provisions of O. 9, R. 13, Civil Procedure Code and, the decree being one and indivisible in its nature, the whole decree ought to be set aside.

K. S. Jayarama Iyer for Petitioner.

N. R. Govindachari for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ.
28th October, 1926.

A. S. No. 62 of 1921.

Evidence Act, S. 33 proviso—" Parties or representatives in interest "—Meaning of—Deposition in a previous suit between the

natural father of an adopted boy and another—Subsequent suit between the adopted boy and the other—Natural father whether the representative in interest of the adopted boy—Hindu Law—Adoption—Consent of Sapindas—Father and son—Consent of father—Necessity of—Acknowledge of paternity—Onus of proof.

For a prior deposition to be admissible under S. 33 of the Evidence Act, the party in the prior suit should have represented in interest the party in the subsequent suit. 40 E.R. 498 followed. The natural father of an adopted boy who was a party to a prior suit cannot be said to be a representative in interest of the adopted boy who is a party in a subsequent suit.

In the matter of obtaining consent of sapindas the sons are not on an equal decree with their father; consequently consent of father is necessary and sufficient. Acknowledges of parents that the child is their child shifts the burden of proving that the child is not theirs on the party who alleges it. Douglas Peerage case in Famous Notable British Trial series relied on.

T. R. Ramachandra Iyer, *N. A. Krishna Iyer* and *C. Rama Row* for Appellant.

S. Sreenivasa Aiyangar, *A. Krishnasami Iyer* and *S. Venkatesa Aiyangar* for Respondent.

N. S.

Jackson, J.
1st November, 1926. } S. A. Nos. 402 and 403 of 1924.

Evidence Act, S. 157—Question relating to boundaries. Document referring to such boundaries but not inter partes*—Persons connected with the transactions examined as witnesses—Admissibility of the document—*Res judicata*— General principles of—Decree for rent—Summons not in Civil Court served on the ryot—Subsequent suit by ryot for declaration of title to both the warams—If barred by* Res judicata.

Documents referring to the boundaries of properties in the suit, though not *inter partes* may be relevant and admissible under S. 157 of the Evidence Act, when the persons connected with the transactions have been examined as witnesses in the suit.

Where a landlord obtained a decree for rent in a prior suit and it was found that the summons had not been served on the ryot, a subsequent suit by the ryot for declaration of title to both the warams in a Civil Court is not barred by the general principles of *Res judicata* apart from S. 11 Civil Procedure Code.

K. S. Sankara Aiyar for Appellant.

T. M. Krishnasamier and *N. Sivaramakrishna Aiyar* for Respondent.

N. S.

Sir Kumarasami and Reilly, JJ.
1st November, 1926. } A. S. No. 205 of 1922.

Evidence Act, S. 33—Deposition heard by 3 out of 5 arbitrators—Whether amounts to evidence given before "a person authorized by law to take it" or in a "judicial proceeding."

Where 5 arbitrators were appointed to decide a dispute and the reference did not authorize some only of them to act in any matter, a deposition of a witness heard by 3 of the arbitrators in the absence of the other two is not admissible in a subsequent suit between the parties. 3 out of 5 arbitrators are not properly constituted to take evidence and the proceeding ceases to be judicial when some of the arbitrators are not present. Recording evidence may be a ministerial act but hearing it is a judicial act and in the absence of directions contra in the reference all the arbitrators must take part in hearing evidence. 12 M. 113 and 14 C. L. J. 143 applied.

A. Krishnasami Aiyar, *B. Batyanarayana* and *K. N. Rajagopala Sastry* for Appellant.

S. Varadachariar, *T. V. Muthukrishna Aiyar*, *Y. Suryanarayana*, *K. S. Champakesa Aiyangar* and *N. Muthusamy Aiyar* for Respondent.

N. S.

Waller, J.
2nd November, 1926. } S. A. No. 390 of 1924.

Transfer of Property Act, S. 3—" *Notice* "—*Surrender by a Hindu Widow*—*Recital of the same in sale-deed*—*Surrender vitiated by fraud*—*Vendee, whether purchaser without notice.*

A recital in a sale-deed that the vendor's title to the property is based on a relinquishment by a Hindu widow to whose husband he is the nearest reversioner is sufficient to put the vendee on enquiry as to the validity of the relinquishment and, if the relinquishment is, in fact, vitiated by fraud, he is not a *bona fide* purchaser for value without notice. 44 M. L. J. 527 referred to.

V. Govindarajachari for Appellant.

K. Bhimasankaram for *Mr. B. Satyanarayana* for Respondent.

N. S.

Curgenven, J.
2nd November, 1926. } C. R. C. No. 250 of 1926.

Criminal Procedure Code, S. 488—*Order for maintenance*—*Subsequent residence of wife with husband for some time and birth of a child*—*Wife subsequently leaving husband*—*Right to enforce the original order.*

After the passing of an order for maintenance the wife went and lived with her husband for some months and got a child. Subsequently she left her husband and applied to enforce the original order for maintenance.

Held, that the fact that she stayed with her husband for some months did not *ipso facto* cancel the original order which was only suspended during that time. 75 I. C. 529 followed.

P. N. Appusami Aiyar and *P. R. Srinivasan* for Petitioners.

V. Rajagopalachari for Respondent.

N. S.

Reilly, J.
2nd November, 1926. } S. A. No. 470 of 1924.

Inam—Resumption of service inam—Alienation by the holder of the inam of the entire properties granted in inam without reserving the annual net assessment for the service—Validity of the resumption.

A holder of a service inam alienated the entire properties comprised granted in inam without reserving the annual net assessment for the service and Government resumed the inam.

Held, that the alienation was invalid and the resumption by the Government was proper and valid. 42 M. 673 distinguished.

K. Rajah Aiyar for Appellant.

The Government Pleader and *R. Sethurama Sastry* for Respondents.

N. S.

Kumarasami Sastry and Reilly, JJ.
2nd November, 1926. } A. S. No. 168 of 1923.

Limitation Act, Art. 144—*Adverse possession—Tenants in common—Ouster—Clear evidence of—Non-receipt of rents.*

To constitute adverse possession as between tenants in common clear evidence of ouster to the knowledge of the person excluded is necessary. Mere non-receipt of rents by the person alleged to be excluded does not constitute ouster.

B. Satyanarayana for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

Reilly, J.
2nd November, 1926. } S. A. No. 210 of 1924.

Decree—Execution—Right legal representative not brought on record—Execution proceeded against a person in possession who was supposed to be the legal representative—Validity of.

Where in execution of a decree the right legal representative was not brought on record but execution was proceeded with against the person in possession of the properties who was supposed to be the legal representative, the execution proceedings are valid. 29 M. L. J. 698 followed.

Watrap S. Subramania Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *A. C. Sampath Aiyangar* for Respondent.

N. S.

Krishnan and Venkata-subba Rao, JJ. *28th October*, 1926. S. A. No. 163 of 1924.

Malabar Law—Gift by a person to his wife and her children by him—Whether tavazhi property.

Properties gifted by a person to his wife and his children by her will not constitute tavazhi property when that woman has also got children left by a former husband. A tavazhi is a pure creature of law and cannot be created by any act of parties. Consequently a sub-tavazhi consisting of the children by one husband alone cannot be recognized as validly constituted.

Observations to the contrary in 39 M. 317 and 42 M. 869 Dissented from.

D. A. Krishna Warrior for Appellant.

K. P. M. Menon for Respondent.

N. S.

Curgenven, J. *2nd November*, 1926. S. A. No. 717 of 1924.

Madras District Municipalities Act, Ss. 207 *and* 214 (2)—*Power of Municipality to call upon a house-owner to demolish a latrine as being insanitary—Suit in civil Court for declaration that notice issued by the Municipality is illegal—Maintainability.*

A Municipality has power to call upon a house-owner to demolish a latrine in his house on the ground that it is insanitary and the Municipality is not bound to specify the place or the manner in which it ought to be reconstructed. Consequently, where the Municipality issues a notice to that effect, the Civil Court cannot entertain a suit for a declaration that the notice is illegal and for an injunction restraining the Municipality from enforcing the same.

V. Ramadoss for Appellant.

C. Venkatasubbaramiah for Respondent.

N. S.

Krishnan and Odgers, JJ. *3rd November*, 1926. A. Nos. 149 and 150 of 1925.

Civil Procedure Code, S. 92—*Suit for a scheme in respect of a choultry used as a rest-house—Residents of the town where choultry is situated—Whether persons "having an interest."*

Where the plaintiffs in a suit under S. 92, Civil Procedure Code, for a scheme in respect of a choulty used as a rest-house by the travellers and pilgrims merely claimed that they were residents of the town where the choulty was situated and as such interested in the well being of the institution, they cannot be said to be " persons having an interest in the trust " within the meaning of S. 92. 47 M. 884 P. C. Followed. 35 M. L. J. 661. Explained.

N. Rama Rao for Appellants.

P. Satyanarayana Rao for Respondents.

N. S.

N R C

Krishnan and Odgers, JJ.
3rd November, 1926. } A. S. No. 191 of 1925.

Land Acquisition Act, S. 23—*Market value—Cocoanut garden—Capitalisation of annual value method.*

In the case of a cocoanut garden, considering the future life of the garden, only 12 years' purchase or 13 years' purchase should be given as compensation and not 20 years' purchase as in the case of buildings fetching rent.

The Government Pleader for Appellant.

A. Satyanarayana for Respondent.

N. S.

Sundaram Chetty, J.
3rd November, 1926. } S. A. No. 504 of 1924.

Limitation Act, Art. 120—*Record of rights—Entry in—Suit for declaration that the entry is wrong and for setting aside the same—Suit Cognizable by District Munsiff but tried by a sub-Court—Legality of—Madras Estates Land Act—Dharmilla Inam of both the warams—Inamdar whether a landholder.*

The trial of a suit by a higher tribunal when it ought to have been tried by a lower tribunal is a mere irregularity and not an illegality which would vitiate the trial.

A suit under the Madras Estates Land Act for a declaration that an entry in the Record of Rights that the defendants had occupancy rights in the village was wrong and for setting aside the same is Governed by Article 120 of the Limitation Act and time must be computed from the date of the publication of the Record of Rights. 36 M. 383 and 34 I. C. 702. Approved and Followed.

The grantee of a Dharmilla Inam of both the warams is a landholder within the meaning of the Madras Estates Land Act, and tenants under him acquire occupancy rights. The presumption in the case of a Dharmilla Inam is always that it is a grant of ryoti land. 45 M. 716 F. B. applied.

G. Lakshmanna for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

Jackson, J.
3rd November, 1926. } S. A. No. 687 of 1924.

Interest—Printed heading in bill of tradesman—Whether amounts to a demand.

A printed heading in a bill of a tradesman that interest will be charged on the arrears after a certain time does not amount to a demand for payment of interest. 20 I. C. 194 Followed.

A. K. Madhava Rao for Appellant.

Watrap S. Subramania Aiyar for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ.
5th November, 1926.

A. S. No. 110 of 1923.

Transfer of Property Act, S. 52—*Alienation subsequent to the filing of a suit* in forma pauperis *but before it was registered as a suit—Whether affected by* lis pendens—*Decree—Arrangement between decree-holder and judgment-debtor not to decree the decree—Assignment of decree—Assignee with notice of the arrangement executing the decree and purchasing the properties—Rights of the purchaser.*

An alienation of the properties subsequent to the filing of a suit *in forma pauperis* in respect of those properties but before it was registered as a suit is affected by *lis pendens*. 30 A. 95 Followed.

The decree holder and the judgment-debtor entered into an arrangement that the decree-holder should not execute the decree in consideration of receiving certain amounts. The decree-holder received certain amounts from the judgment-debtor and did not execute the decree for a number of years. Subsequently the decree-holder assigned the decree to a third person who took it with notice of the arrangement between the decree-holder and the judgment-debtor. The assignee executed the decree and purchased the properties.

Held, (by Krishnan, J.) that the assignee of the decree-holder was not precluded from executing the decree because he was aware of the arrangement between the decree-holder and the judgment-debtor and therefore the execution and the sale were valid. 42 M. 338 Referred to (by Venkatasubba Rao, J.) that the doctrine of part performance applied and the assignee of the decree-holder who purchased the properties was not entitled to recover possession of the properties. 46 M. 919 Referred to.

T. M. Krishnasami Aiyar and *M. S. Vaidhinatha Aiyar* for Appellant.

C. V. Ananthakrishna Aiyar and *C. V. Harihara Aiyar* for Respondent.

N. S.

Krishnan and Odgers, JJ.
9th November, 1926.

O. S. A. No. 61 of 1925.

Partnership—Breach of some of the terms of the Partnership—Suit for damages—Maintainability.

A suit for damages by one partner against another for alleged breach of the terms of the partnership without asking for the dissolution of the partnership and for general accounts is not maintainable. 39 M. L. J. 257 P. C. Relied on 32 M. 76 Distinguished.

T. C. A. Anandalwan for Appellant.

K. S. Krishnaswami Iyengar for Respondent.

N. S.

Curgenven, J.
9th November, 1926. } S. A. No. 225 of 1924.

Will—Construction—Authority to mortgage—Hindu widow—Personal debt—Mortgage.

Where a testator granted a life estate to his widow and by his will authorized her to discharge the encumbrance on some of the items either from the surplus out of the income or on the liability of the hypotheca and the widow purporting to act under the authority discharged the mortgage by creating an usufructuary mortgage of one of the items and later on discharged this mortgage by borrowing monies on a promissory note executed by herself and another jointly and finally discharged this pronote by executing a simple mortgage of all the items of the property which had been originally mortgaged, *Held*, in a suit by the remainderman, that the last mortgage was not binding on him as the widow had no authority to mortgage the property for her personal debt evidenced by the pronote though the amount had been applied for the discharge of the husband's debt. 4 Bom. 5 Followed.

K. S. Jayarama Aiyar and *T. S. Venkatesa Aiyar* for Appellant.

E. Vinayaka Rao for Respondent.

N. S.

Odgers and Jackson, JJ.
9th November, 1926. } A. S. No. 128 of 1926.

Malabar Law—Suit for removal of karnavan and for accounts—Karnavan became a stani pending suit—If suit for account lies—Powers and liabilities of karnavan under Malabar Law.

The Junior members of a kovilagom in Malabar filed a suit for the removal of the Valia Thamburatti (Karnavati) and for accounts from her for her past mismanagement and also second defendant who was alleged to be her agent. The Lower Court held that this suit cannot any longer proceed as the karnavati cannot be removed and apart from removal no suit for accounts lies against the karnavati. On appeal by the junior members,

Held, a karnavan cannot be sued for accounts by the junior members apart from a suit for removal. The prayer for accounts is incidental to the prayer for removal. But a karnavan may be liable for acts of fraud or mis-management and he will be bound to recoup the losses of the members of the tarwad in a properly framed suit. The karnavan is only one among the members of the tarwad, all of whom have proprietory interests in the property. 5 L. W. 511 : 3 M. 169 : 23 M. L. J. 706 Followed.

C. V. Ananthakrishna Aiyar and *P. S. Narayanaswami Aiyar* for Appellants.

T. R. Ramachandra Aiyar and *K. P. Ramakrishna Aiyar* for Respondents.

N. S.

Waller and Madhavan Nair, JJ. }
9th November, 1926. } A. S. No. 427 of 1925.

Land Acquisition Act, Ss. 18 *and* 31—*Claimant claiming other lands in exchange and not money value—Deposit of amount by Land Acquisition Officer in Court and reference by him—Order of District Court that there was no reference under S.* 18—*Appeal—Whether lies.*

A claimant in a land acquisition case put in a statement that he wanted other lands in exchange and not money compensation. He refused to receive the amount awarded and the Land Acquisition Officer deposited the amount in Court under S. 31 of the Land Acquisition Act and referred the matter to the Court. The District Court held that there was no reference under S. 18. *Held* that an appeal lay to the High Court against the aforesaid order.

M. Krishna Bharathi for Appellant.

The Government Pleader for Respondent.

N. S.

Jackson, J. }
10th November, 1926. } S. A. No. 266 of 1924.

Lease—Heirs of lessee—Joint liability to pay rent.

The joint and several liability attaching to tenants in common under a lease is also enforceable by the landlord against their heirs.

The heirs unlike assignees cannot claim to have their liability restricted only to such share of the demised premises as they may be in possession of under an arrangement for partition to which the landlord is not a consenting party. C. R. P. No. 678 of 1922 distinguished. 53 Calcutta 197 and 1923 1 K. B. 469 followed.

P. Satyanarayana Rao for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Jackson, J. }
10th November, 1926. } S. A. No. 566 of 1924.

Evidence Act, Ss. 13 *and* 32 (3) *and* (7)—*Ancient documents—Recitals as to boundaries—Admissibility.*

Recitals in a document about boundaries, even though the documents are ancient documents are not admissible in evidence under S. 13 or 32 (3) or (7).

T. M. Krishnasami Aiyar for Appellant.

K. Narasimha Aiyar for Respondent.

N. S.

Jackson, J. }
10th November, 1926. } S. A. Nos. 1777 to 1793 of 1922.

Court-fees Act, S. 7, XI (cc)—Suit to recover property from tenant—Tenant denying landlord's title and setting up occupancy rights—Court-fee payable.

N R C

S. 7, XI (cc) is not confined to cases where the defendant is estopped from denying plaintiff's title.

S. *Varadachariar* and A. *Satyanarayana* for Appellant.

P. *Venkatramana Rao* and K. S. *Desikan* for Respondent.

N. S.

Curgenven, J.

10th November, 1926.

S. A. Nos. 283 and 300 of 1924.

Hindu Law—Alienations by widow—Suit by step-daughter impeaching the alienation—Decree for possession, mesne profits and costs—Appeal by alienees—Death of Plaintiff-Respondent—Sister's sons whether proper legal representatives.

A Hindu widow alienated the properties of the last male owner and her step-daughter as reversioner brought a suit after her death for recovery of possession of properties. She obtained a decree for possession, mesne profits and costs. The alienees appealed. Pending the appeal, the Plaintiff-Respondent died and her deceased sister's sons were brought on record as her legal representatives.

Held on appeal that the sister's sons are the proper legal representatives, because the suit was one of a representative character in so far as it was for possession of the properties. 39 M. 634 followed.

Held also that in so far as mesne profits and costs were concerned, in the absence of somebody coming and claiming the same, the persons who have been brought on record as the legal representatives will be entitled to the same and a decree can be given to them.

K. *Kameswara Rao*, M. *Ramachandra Rao* and N. *Rama Rao* for Appellant.

B. *Satyanarayana* for Respondent.

N. S.

Curgenven, J.

10th November, 1926.

S. A. No. 219 of 1924.

Evidence Act, S. 115—*Representation of intention of a person —Whether sufficient to give rise to Estoppel—Limitation Act, Articles* 123, 136 *and* 140—*Bequest to a person—Life enjoyment to another till he was paid a certain amount—Suit by a purchaser from the devisee against the latter for possession on payment of the amount—Limitation.*

A mere representation of the intention of a person as to what he would do in the future cannot give rise to an estoppel though the person to whom such representation was made was mislead by such representation. 5 H. L. C. 185, 1896 A. C. 231 (238) and 7 Bom. L. R. 179 (184) Referred to. 20 Cal. 296 distinguished. A testator bequeathed his properties to a certain person but gave their enjoyment to another until the latter was paid a certain sum of money by the former. A suit brought by a purchaser from the former against the latter for possession of the properties on payment of the specified sum of money is not governed by any of the articles 123, 136 or 140 of the Limitation Act.

S. *Varadachariar* and K. R. *Rama Aiyar* for Appellant.

K. R. *Rangaswami Iyengar* for Respondent.

N. S.

Curgenven, J.
10th November, 1926. } S. A. No. 1330 of 1924.

Revenue Recovery Act, S. 59—Suit for recovery of cess under the Irrigation Cess Act—Suit for one relief barred—Court whether can refuse to decree the other reliefs which are not barred.

In a suit by a land-holder for a declaration that his lands were entitled to irrigation free of cess and for an injunction restraining the Secretary of State from levying the irrigation cess, *held* that S. 59 of the Revenue Recovery Act would apply if the collection of the cess was effected through the use of the coercive processes under the Act. 46 M. 488 referred to.

Where a Plaintiff asks for more than one relief in respect of a cause of action and one of such reliefs is barred by limitation, the Court cannot refuse to give him the other reliefs if they are in time.

B. Jagannada Doss for Appellant.

The Government Pleader for Respondent.

N. S.

Krishnan and Odgers, JJ.
11th November, 1926. } O. S. A. No. 76 of 1925.

Contract Act, Ss. 211 and 214—Commission agent directed to sell goods at a particular place—Whether can sell them at another place, apart from special usage.

A commission agent who consigns goods on behalf of local merchants to foreign markets to have them sold through his agents in those places has no general authority, in the absence of specific instructions or special usage, to re-ship the goods from the place to which it was originally consigned to some other place and have them sold there.

K. S. Krishnaswami Iyengar and *N. Srinivasa Iyengar* for Appellant.

K. S. Rajagopala Iyengar for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
12th November, 1926. } A. S. No. 134 of 1922.

Hindu Law—Partition—Suit for, by minor co-parcener—Consent decree—Date from which account should be taken.

The doctrine that a unilateral declaration of intention to separate expressed in the plaint in a partition suit will effect a severance in status has no application in the case of a partition suit instituted by a minor co-parcener, as the guardian's declaration of intention would not be a substitute for the minor's intention and the Court would decree parti ion only if it would be beneficial to him. 41 M. 442 referred to. But where the Court passes a preliminary decree for partition in a suit by minor, it must be deemed to have effected a partition as on the date of the institution of the suit and consequently the severance in status

would relate back to the date of the institution of the suit and accounts must be taken on this basis. The fact that the preliminary decree is a consent decree does not make any difference. 48. M. 465 referred to.

S. Varadachariar for Appellant.

S. Panchapegasa Sastri for Respondent.

N. S.

Sundaram Chetty, J.
12th November, 1926. } C. R. P. Nos. 830 and 915 of 1926.

Madras Local Boards Act, S. 55, Clause (2), Sub-clause (5), Rr. 5 and 11—Rejection of the nomination paper of a candidate—Suit for declaration that he was validly nominated—Decree—Subsequent inclusion of name in the ballot paper and holding of the election the next day—Validity of the election—Decision whether Res judicata *in a subsequent objection petition filed by an unsuccessful candidate—S. 11—"Unless expressly provided"—Meaning of.*

Where the nomination paper of a candidate who stood for election was rejected as invalid and the candidate filed a suit for a declaration that he was a validly nominated candidate and obtained a decree, and subsequently his name was included in the ballot paper and the election was held the next day, *held* that the decree related back to the date when the nomination list was published and the candidate's name must be deemed to have been included in the published list of valid nominations and consequently the election does not infringe the provisions of R. 5 (*a*) of the Rules published under the Madras Local Boards Act.

Held also that the Judgment in the candidate's suit would not operate as *res judicata* in a subsequent election objection petition filed by an unsuccessful candidate in the election, as the latter was not a party to the previous suit.

Where a person is elected as a member in respect of a vacancy which is to occur in future, he must be considered to be a member only as and from the date when the vacancy would occur and not when his name is published on the Notice Board before the date of the vacancy. The words unless expressly provided in S. 11 of the Act must be so construed as to make the newly elected member entitled to hold office only from the commencement of the vacancy.

T. Rangachariar and *A. Swaminatha Iyer* for Petitioner.

K. V. Krishnaswami Iyer, *Watrap Subramania Iyer* and *C. A. Seshagiri Sastri* for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ.
12th November, 1926. } A. S. No. 435 of 1922.

Minor—Decree against—Execution—Guardian ad litem *refusing notice of execution proceedings, but not removed by order of Court—Minor whether properly represented.*

A decree was obtained against a minor represented by a guardian *ad litem*. The guardian *ad litem* refused to receive notice of sale proclamation and to act on behalf of the minor in subsequent proceed-

ings in execution of the decree. But the Court did not pass an order removing him from guardianship.

Held, that the guardian *ad litem* continued to represent the minor until he was removed by order of Court. 94 I. C. 352 and C. M. A. 488 of 1920 followed.

T. Rangachariar and *V. N. Venkatavaradachariar* for Appellant.

T. R. Ramachandra Aiyar and *A. V. Visvanatha Sastri* for Respondent.

N. S.

The Chief Justice, Krishnan and Curgenven, JJ.
12th November, 1926.

S. A. No. 1269 of 1923.

Hindu Law—Partition suit against father—Debts incurred by father for purposes not binding on the family—Whether father's share primarily liable.

There is no authority for saying that, in a partition suit against a Hindu father, the debts incurred by the father for purposes not binding on the joint family should in the first instance be directed to be paid out of the properties set apart for the father's share and the properties set apart for the son's shares should be made liable for the same only if the father's share is insufficient to pay the debts in full.

A. Krishnaswami Iyer and *B. Somayya* for Appellant.

K. Krishnasami Aiyengar for Respondent.

N. S.

Sundaram Chetti, J.
12th November, 1926.

C. R. P. No. 829 of 1926.

Civil Procedure Code, O. 11, R. 14—Order for production of documents without a prior order for discovery—Legality of.

No order for production of documents by a party ought to be passed in the first instance without complying with the procedure prescribed under the earlier Rules of O. 11. There must first be an order for discovery under R 12 and an opportunity given to the party to state his case in respect of the documents he has disclosed. Then only order for production should be passed.

T. Rangachariar and *V. N. Venkatavaradachariar* for Petitioner.

T. S. Ramasami Iyer and *S. Panchapegasa Sastri* for Respondent.

N. S.

Waller and Madhavan Nair, JJ.
15th November, 1926.

C. M. A. Nos. 228 and 229 of 1925.

Insolvency—Joint Hindu family—Father adjudicated as insolvent—Shares of minor sons whether vest in the Official Receiver—Power to dispose of minor sons' share—Right of official Receiver to exercise,

Where under the Provincial Insolvency Act, the father, and the major son were adjudicated insolvents and the undivided minor sons' shares were devoted to be vested in the Official Receiver on the ground that the debt was one incurred for joint family business.

Held, that the shares of the minor sons did not so vest and the lower court's order should be modified by reserving the right of the father to dispose of the shares of the minor sons to the Official Receiver. 51 M. L. J. 269 followed.

A. Ramachandra Iyer and *T. D. Srinivasachari* for Appellants.

T. M. Krishnaswami Iyer and *B. C. Seshachella Iyer* for Respondents.

N. S.

Venkatasubba Rao, J.
15th November, 1926. } T. O. S. 10 of 1926.

Hindu Law—Inheritance—Unchaste widow, when becomes degraded woman—Stridhan of degraded woman—Succession to.

Where a Hindu married woman lived after her husband's death in a continued state of unchastity, she is not thereby to be regarded as a degraded woman for purposes of successsion under the Hindu Law. 31 M. 100 followed.

Expulsion from caste is necessary for the unchaste widow to become degraded. The heirs to the stridhanam property of a degraded woman dying without issue take according to the ordinary rules of succession and her husband's brother is a nearer heir than her maternal uncle unchastity does not destroy either the tie of blood relationship or the tie of marriage. 23 M. 171, 40 C. 650 and 38 M. 1144, referred to.

S. Duraisami Aiyar for Plaintiff.

N. Sivaramakrishna Aiyar for Respondent.

N. S.

Jackson, J.
15th November, 1926. } S. A. No. 661 of 1924.

Civil Procedure Code, S. 11—Adverse finding—Res judicata—*Appeal.*

Where a decree is passed in favour of a party to a suit but a finding adverse to him is given on another issue in the suit, the party can appeal against the adverse finding. 47 M. 487 and 1926 Mad. 974 referred to.

The question of appealability is not material when considering the question whether the finding on the issue operates as *res judicata* in a subsequent suit between the parties. Where the parties raise an issue, it must be held to have been directly in issue though it might have been unnecessarily framed. The real point for decision is whether the issue was substantialy in issue or incidentally in issue, and not whether the issue was necessary or not. 11 C. 301, 48 C. 466 and 51 C. 631 considered.

K. S. Jayarama Aiyar for Appellant.

P. R. Srinivasan for Respondent.

N. S.

Ramesam, J.
16th November, 1926. } S. A. No. 462 of 1924.

Limitation Act, Arts. 127 *and* 144—*Hindu co-parcener—Alienee—Adverse possession.*

The proposition that as between co-parceners there can be no adverse possession except on proof of ouster has no application as between an alienee from a co-parcener and the other co-parceners.

Although a co-parcener dealing with more than his share is incompetent to pass a higher title than he has, there is nothing in law to prevent the alienee from prescribing for a good title by adverse possession.

The article of the Indian Limitation Act applicable to such a case is article 144 and not 127. 12 Weir 292, 42 M. L. J. 364, followed. 27 M. L. J. 600 dissented from.

Ch. Raghava Rao for Appellant.

A. Venkatachellam and *B. Satyanarayana* for Respondents.

N. S.

The Chief Justice and
Srinivasa Aiyangar, J.
16th November, 1926. } L. P. A. No. 161 of 1925.

Hindu Law—Limited owner—Alienation not for legal necessity but with consent of next reversioner—Suit by that reversioner to recover possession of the properties alienated after the death of the limited owner—Estoppel.

Where the plaintiff sued to recover possession of the properties alienated by his mother on the ground that the alienation was not for any legal necessity. But he had himself given his consent to that alienation. The deed of alienation recited the purpose for which the alienation was made so that the alienee was fixed with knowledge of that purpose and that purpose was not in law such as would amount to legal necessity.

Held that, whether the purpose would amount to legal necessity or not, the plaintiff who had given his consent to the alienation was estopped from questioning the rights of the alienee.

S. Varadachariar and *A. Visvanatha Iyer* for Appellant.

V. C. Viraraghavan for *K. Bhasyam Aiyangar* for Respondent.

N. S.

Curgenven, J.
16th November, 1926. } S. A. No. 659 of 1925.

Registration Act, Ss. 17 *and* 49—*Partition share lists—Unregistered—Admissibility—Re-opening of partition—Grounds for—Award of Jyeshtabhagham whether a ground.*

Where, in a suit for partition, the Defendants pleaded that a partition had been made and put in evidence unregistered Karaiolais or share lists signed by all the parties and only attested,

Held, that the partition lists do not contain operative words of division of status and are admissible in evidence of an actual partition by metes and bounds, without registration. 19 L. W. 494 (Foll.) 30 M. L. J. 404 (Distinguished.)

Held, also that a partition cannot be re-opened except in cases of fraud or misrepresentation, on the ground that the values of the shares allotted to the members are unequal and that a Jyeshtabhagham was given to the eldest member of the family. Gour's Hindu Law, p. 679 (referred to) 39 M. L. J. 382 (F. B.) (Distinguished.)

K. Balasubramaniya Iyer for Appellant.

K. Bhashyam Iyengar for Respondents.

N. S.

Jackson, J.
16th November, 1926. } S. A. No. 713 of 1924.

Contract Act, S. 23—Opposed to public policy—Hypothecation bond—Agreement to render service in lieu of interest—Stipulation to pay interest at exorbitant rate in default of rendering service—Bond whether enforceable.

Where two persons executed a hypothecation bond and one of them agreed to render service in lieu of interest and also agreed to receive wages at a certain rate and in default of service, it was agreed that the executants should pay interest at a rate which amounted to Rs. 175 per cent. per annum, and that executant left off service for one year.

Held, that the bond was opposed to public policy and so was not enforceable.

Held also that the money paid under the bond could not be recovered.

Quaere.—Whether such a bond is a slavery bond? 42 Cal. 247 and 27 C. L. J. 459 considered.

T. D. Srinivasachri for Appellant.

S. *Ranganatha Iyer* for Respondent.

N. S.

Curgenven, J.
16th November, 1926. } S. A. No. 646 of 1924.

Hindu Law—Widow—Alienation for no consideration—Subsequent surrender to the next reversioner—Alienee whether entitled to hold the properties during the widow's life-time.

Where a Hindu widow alienated her husband's properties for no consideration and subsequently surrendered all her rights in favour of the next reversioner and the latter brought a suit against the alienee for recovery of the properties alienated to him by the widow,

Held that the alienee was entitled to hold the properties during the life-time of the widow and the fact that the widow surrendered all her rights to the plaintiff would not entitle him to recover possession of the properties so long as the widow was alive. 39 M. 1035, 41 M. 75 and 48 M. 903 referred to.

K. V. Krishnasami Aiyar and *N. Swaminathan* for Appellant.

B. Sitaram Rao and *K. V. Sesha Aiyangar* for Respondent.

N. S.

Ramesam, J.
16th November, 1926. } S. A. Nos. 336 and 337 of 1924.

Inam—Akaram service inam—Post settlement inam—Resumption—Right of Zamindar to resume—Presumption—Grant whether burdened with service or in lieu of wages.

In the case of a post-settlement inam granted for Akaram service, there is a presumption that the zamindar can resume it and the onus of proving that it is not resumable is upon the grantee. 1911 (2) M. W. N. 406 : 8 M. L. T. 82, Relied on. 28 B. 305, distinguished. 30 M. L. J. 132 Q. B, referred to. Observations in 50 M. L. J, 251, not approved.

S. Venkatesa Aiyangar for Appellant.

V. Govindarajachari for Respondent.

N. S.

Ramesam, J.
17th November, 1926. } S. A. No. 1601 of 1923 and C. R. P. No. 867 of 1923.

Civil Procedure Code, O. 41, R. 27—Failure to record reasons—Mere irregularity—Waiver.

The failure of the appellant court to record reasons for taking additional evidence as prescribed by O. 41, R. 27 is a mere irregularity which does not constitute a ground for interference in second appeal or in revision except on proof of prejudice to the party complaining of the irregularity.

The irregularity is one curable by consent of parties and capable of waiver. 1 L. W. 77 distinguished.

Ch. Raghava Rao for Appellants.

B. Somayya for Respondents.

N. S.

Beasley, J.
17th November, 1926. } O. P. No. 62 of 1922.

Companies Act, Ss. 186 and 229—Limited Company—Liquidator's call—Decree against company in favour of some of the directors—Right to set off, whether exists—Civil Procedure Code, S. 141.

7 out of 10 directors of a limited company obtained a decree against the company. The company went into liquidation and the Liquidator called for contributions. The 7 directors wanted to set off the decree amount against the Liquidator's call.

Held, such a set off is not allowable under the Companies Act. S. 186 (2) of the Companies Act allows such a set off only in the case of *unlimited* companies. Buckly on Companies (1924 Edition), p. 396, followed. Nor does S. 229 of the Companies Act allow such a set off. S. 141 of the Civil Procedure Code also cannot be invoked ; for it applies only to suits and not to applications taken by the Liquidator calling for contributions under the Companies Act.

N R C

V. Narasimha Aiyangar for Liquidator.

N. Sivaramakrishna Aiyar for Directors.

N. S.

Wallace and Madhavan Nair, JJ.
17th November, 1926.

C. M. A. No. 374 of 1924.

Court-fees Act, S. 7 (5)—Madras Civil Courts Act, S. 14—Suit for declaration as to facture and validity of adoption—Land indirectly affected—Determination of forum.

A suit for a declaration as to the factum and validity of an adoption by which title to land may be indirectly affected is not a suit of which the subject matter is land within Section 14 of the Madras Civil Courts Act, and consequently the computation prescribed by Section 7, Clause V of the Court-fees Act, does not determine the forum for purposes of jurisdiction. 13 I. C. 903, followed.

The market value of the land in question is in such a case the true test. 49 M. L. J. 309, followed.

The proposition laid down in 12 Mad. 223 that a suit for a declaration cannot stand for purposes of jurisdiction on a higher footing than that of a suit for possession not approved.

The plaintiff is entitled to put his own valuation however arbitrary in all cases in which the value of the relief is not assessable in terms of money such as in a suit for restitution of conjugal rights. In all cases in which the relief has relation to subject matter assessable in terms of money, the market value is the true test. 34 Cal. 352, 28 All. 545, 56 I. C. 762, 18. L. W. 399, 43 Bom. 507, 6 Mad. 192, 30 Mad. 18, Referred to.

Ch. Raghava Rao for Appellant.

P. Kameswara Rao and *B. Somayya* for Respondents.

N. S.

Wallace and Madhavan Nair, JJ.
17th November, 1926.

L. P. A. No. 328 of 1926.

Letters Patent Clause 15—"*Judgment*"—*Order staying execution of a decree.*

An order for stay of execution of a decree is a "Judgment" within the meaning of clause 15 of the Letters Patent and an appeal lies from that order of a Single Judge of the High Court to a Bench of 2 Judges. 49 M. L. J. 25 P. C., referred to. 35 M. 1., followed.

T. Rangachari, V. N. Venkatavaradachari and *R. Gopalachari* for Appellant.

C. S. Venkatachari for Respondent.

N. S.

Waller, J.
17th November, 1926.

C. R. P. No. 1372 of 1925.

Civil Procedure Code, O. 23, R. 3—Compromise—Court passing decree in ignorance of the compromise—Jurisdiction of Court to record compromise subsequently.

A Court has got jurisdiction to record a compromise even though it has passed a decree in ignorance of the compromise petition filed on the same day.

K. V. Sesha Aiyangar for Petitioner.

V. Ramasami Aiyar for Respondent.

N. S.

Curgenven, J.
18th November, 1926. } S. A. No. 1549 of 1925.

Hindu Law—Reversioner—Suit by—Proof of title—Onus of proof—Necessity to prove absence of nearer reversioner.

Where a Hindu reversioner brings a suit for recovery of possession of the properties of the last male owner from the person in possession, the onus lies on him to prove not only that he is the reversioner but also to prove at least *prima facie* that there is no other nearer reversioner living. 12 M. I. A. 448, 23 A. 72 P. C., 23 C. W. N. 1048 and 40 M. 654, followed.

K. V. Krishasami Aiyar and *N. Swaminathan* for Appellant.

A. C. Samputh Aiyangar and *P. C. Parthasarathi Aiyangar* for Respondent.

N. S.

Curgenven, J.
18th November, 1926. } A. S. Nos. 25 and 417 of 1924.

Civil Procedure Code, O. 47, R. 1—Application for review—Whether can be filed in forma pauperis.

A petition for review of a decree in a suit or appeal which was filed after payment of Court-fees can be filed *in forma pauperis.*

K. Krishnasami Aiyangar for Petitioner.

N. S.

Krishnan and Odgers, JJ.
19th November, 1926. } A. S. No. 324 of 1925.

Transfer of Property Act, S. 53—Mortgage to one of the creditors by the debtor—No proof that debtor was in insolvent circumstances—Mortgage whether valid.

A debtor executed a deed of mortgage to one of his creditors for the amount due to him and as a result of this a number of his other creditors were defeated. There was no proof that the debtor was in insolvent circumstances.

Held, that it was only a preference of a creditor and in the absence of insolvency even a fraudulent preference of a creditor cannot be impeached. 43 C. 521 P. C., followed.

K. S. Desikan for Appellant.

R. Kuppusami Aiyar for *S. Muthiah Mudaliar* for Respondent.

N. S.

Kumarasami Sastri, and Reilly, JJ. *19th November, 1926.* } A. S. No. 325 of 1925.

Hindu Law—Joint Family—Site belonging to joint family—Superstructure built out of self-acquisitions of one of its members—Whether becomes part of the joint family properties.

It is a question of intention to be gathered from the circumstances of each case whether a member of a joint Hindu family can be said to have so dealt with his self-acquired property as to impress it with the character and incidents of joint family property. Where the sole surviving co-parcener in exclusive enjoyment of properties both ancestral and self-acquired raises a superstructure out of his self-acquisitions on the site admittedly belonging to the joint family, the presumption is that he intends to keep the building as his own separate property.

M. Patanjali Sastri for Appellant.

S. Varadachari and *R. Kesava Aiyangar* for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ. *23rd November, 1926.* } A. S. No. 272 of 1925.

Benami Transaction—Purchase in the name of minors represented by guardian by their paternal aunt—Purchase money paid by her and possession also retained by her—Effect—Doctrine of advancement.

Certain properties were purchased in the name of two minor brothers represented by their guardian by their paternal aunt. The latter paid the purchase money and herself was in possession of the properties till her death. In a partition between the two brothers when the paternal aunt was present, this property also was divided between the two brothers. Subsequently the paternal aunt executed a settlement deed, settling the properties on one of the brothers and certain other persons. The other brother brought a suit for half of the properties. The other brother contended that the purchase in the names of the brothers by the aunt was benami for her and the title remained in her so that the settlement by her was valid.

Held, that the source of purchase money and the possession were not the sole tests of the benami character of a transaction and the affection towards the boys, the motive for the purchase and the surrounding circumstances showed that the paternal aunt intended the purchase to be for the benefit of the minors. The doctrine of advancement was applicable. 33 C. 733, 5 Bom. L. R. 784 and 24 A. L. J. 458, referred to.

K. Bhasyam Aiyangar and *S. Panchanada Mudaliar* for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for Respondents.

N. S.

Kumaraswami Sastri and Reilly, JJ. 16*th November*, 1926. A. S. No. 192 of 1923.

Registration Act, S. 49—Partition Lists—Unregistered—Whether admissible in evidence—Division in status.

Unregistered partition Lists are admissible in evidence to prove a division in status, only they cannot be used to affect immoveable property. According to 43 Madras 244 an unregistered document can be used for a collateral purpose and if it is not against the principle of the Registration Act that an unregistered document can be used to show the nature of possession and adverse possession it is difficult to see how a document can be rejected for want of registration, if it is merely intended to show a division in status. It is doubtful if the decisions in 16 L. W. 784 and 87 I. C. 285 lay down good law. 46 M. 349 and 19 L. W. 494 followed. 43 M. 244 P. C. Applied.

B. Somayya and *E. Krishnamurthi* for Appellants.

A. C. Sampath Iyengar for Respondents.

N. S.

Srinivasa Iyengar, J. 17*th November*, 1926. C. R. P. No. 470 of 1926.

Civil Procedure Code, S. 115—Order allowing amendment of plaint—Interference in revision.

The propriety of an order allowing amendment of plaint is more properly a subject of attack in appeal against the decree that may be passed in the suit. The delay worry and expense caused by a trial wi'h an amended plaint is not a sufficient cause for interference in revision.

E. Krishnamurthi for Petitioner.

K. Rajah Iyer for Respondent.

N. S.

Waller, J. 17*th November*, 1926. S. A. No. 348 of 1924.

Endowment—Dedication to particular castes—Validity.

Dedication of a tank or well to the exclusive use of persons belonging to a particular caste or castes is not unknown to law and is perfectly valid.

In the absence of a written instrument evidencing such a limited dedication, it can be inferred from long and exclusive user. 1913 M. W. N. 247 : 18 I. C. 979 referred to.

K. Bhimasankaram for *B. Satyanarayana* for Appellants.

V. Govindarajachari for *A. Krishnaswami Iyer* for Respondents.

N. S.

Odgers and Jackson, JJ. 17*th November*, 1926. A. S. No. 197 of 1924.

Civil Procedure Code, S. 92—Head of Mutt—Whether a trustee.

The head of a mutt is not a trustee in the strict English sense of the term, though he is loosely called a trustee. But he is answerable as a trustee in respect of the administration of the mutt and the management of its properties. A suit can be brought under S. 92 for a scheme in respect of it. 27 M. 435, 40 M. 709 P. C. and 43 C. 707 considered.

K. Rajah Iyer and *V. Ramasamy Iyer* for Appellant.

T. R. Ramachandra Iyer and *N. A. Krishna Iyer* for Respondent.

N. S.

Curgenven, J.
17th November, 1926. } C. R. P. No. 697 of 1926.

Civil Procedure Code, S. 115—Order striking out one of the issues—Revision.

An order striking out an issue is not a "case" within the meaning of S. 115, Civil Procedure Code and consequently is not revisable by the High Court. 17 M. 410 : 43 A. 564, followed.

T. M. Krishnasami Aiyar and *T. S. Anantaraman* for Petitioner.

S. T. Srinivasagopalachari for Respondent.

N. S.

Krishnan and Odgers, JJ.
18th November, 1926. } A. S. No. 352 of 1925.

Land Acquisition Act—Landlord and Tenant—Apportionment—Sale of kudivaram by landlord reserving a small rent—Effect of.

Where an Inamdar executed a sale-deed of kudivaram right in a certain land for Rs. 150 reserving only a right to receive Rs. 4 a year, permanently and where without any Act of improvement by either the landlord or the tenant, a large amount was received for the land under the Land Acquisition Act.

Held that, in apportioning the amount as between the two persons, the document must be treated as a permanent lease and that the landlord is entitled to a share in the increase and that the compensation should be divided in the ratio of 80 to 150, taking the landlord's share at 80 (20 years purchase at Rs. 4 a year) 30 Cal 801 dissented from, 36 Mad. 395 followed.

T. V. Muthukrishna Iyer for Appellant.

K. Aravamuda Aiyengar for Respondent.

N. S.

Ramesam, J.
23rd November, 1926. } S A. No. 528 of 1924.

Contract Act, S. 253 (10)—Partnership for an adventure—Death of partner—Dissolution by—If effected—Suit for accounts—By some of the heirs of a Mahomedan partner—Other heirs not parties—Non-joinder.

Though a partnership may be for a single adventure or undertaking, yet it is previously dissolved by the death of a partner, though the venture or undertaking be then incomplete.

Lindley, p. 153, Ss. 32 (*b*) and 33, Partnership Act, 1890 and 57 L. T. N. S. 53, referred to. The cause of action vesting on the death of a Mahomedan partner on his heirs (to sue for accounts) is single and indivisible, though as between themselves their shares may be several. A suit for accounts by some only of the heirs without making the others parties is not maintainable. 25 Mad. 26, appld. 36 I. C. 77, followed.

A. Krishnaswami Aiyar and *C. Rama Rao* for Appellants.

K. N Rajagopal Sastri (with *S. Varadachariar*) for Respondent.

N. S.

Curgenven, J.
23rd November, 1926. } C. R. P. No. 149 of 1926.

Civil Procedure Code, S. 115—"*Jurisdiction*"—*Meaning of—Erroneous decision on point of limitation—Revision.*

Where the lower Court erroneously decided that an application to set aside an award was out of time and in so deciding failed to deduct the time taken in obtaining a copy of the award as it ought to have done under S. 12 (4) of the Limitation Act, held that the order was however not revisable by the High Court under S. 115 of the Civil Procedure Code. 11 Cal. 6 P. C., 39 Cal. 473, 4 Pat. 800, 46 I. C. 176, 20 All. 78, 16 M. L. T. 478 and 19 M. L. T. 24, referred to and followed. 46 Mad. 938 and 44 Mad. 454, distinguished.

The term " jurisdiction " in S. 115 issued in the ordinary sense, that is " a jurisdiction, local pecuniary, personal or with reference to the subject-matter of the suit " and does not mean " the legal authority of a Court to do certain things namely to make a particular order in a case over which it has jurisdiction." 41 Cal. 323 referred to.

P. Somasundaram for the Petitioner.

V. Govindarajachari for the Respondent.

N. S.

Curgenven, J.
23rd November, 1926. } C. R. P. No. 217 of 1926.

Civil Procedure Code, S. 115—*Order allowing suit to be filed* in forma pauperis—*Revision.*

Where an application for leave to file a suit *in forma pauperis* was opposed by the defendant, but the Government pleader took time for counter affidavit and on the adjourned date reported that he did not oppose the application, held that there was no rule which would entitle the defendant to have a further adjournment of the case to produce evidence and he ought to have been ready on that date itself with evidence.

2. The order of the lower Court allowing the suit to be filed *in forma pauperis* without granting the adjournment is not open to revision under S. 115.

3. The principle laid down in 48 M. 700 under similar circumstances (an appeal from the Original Side) does not apply to revision under S. 115.

S. Ramaswami Iyer for Petitioner.

P. S. Narayanaswami Iyer and *P. S. Ramachandra Iyer* for Respondents.

N. S.

Kumarasami Sastri and Reilly, JJ.
23rd November, 1924. } A. S. No. 101 of 1923.

Hindu Law—Widow—Superstructure built with her funds on her husband's site—Whether accretions—Debt of widow borrowed for building purposes—Validity of.

Any superstructure newly built by a widow with funds of her own on a site belonging to the last male holder goes with the estate and cannot be claimed as her separate property. 31 Mad. 321 and 6 C. L. R. 66 followed. A Hindu widow cannot borrow for building purposes so as to bind the Reversioner. 35 Mad. 560, referred to.

C. V. Ananthakrishna Iyer and *S. Nataraja Nadar* for Appellants.

B. Sitarama Rao and *S. R. Muthusamy Iyer* for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ.
23rd November, 1926. } S. A. No. 1244 of 1923.

Civil Procedure Code, S. 92—Religious Endowment Act, S. 14—Suit by 2 worshippers for mandatory injunction to compel the trustees to receive a certain sum for putting up a pandal in a shrine and to put up the pandal—Necessity for sanction.

Two worshippers of a temple instituted a suit against the trustees of a temple for a mandatory injunction to compel the trustees to receive from them a certain sum for the cost of putting up a pandal in the temple and to put up the pandal.

Held, that the suit as framed was not maintainable without the sanction of the Advocate-General under S. 92, Civil Procedure Code, or of the Court under the Religious Endowment Act, as the plaintiffs did not allege any special and personal right of their own over and above the right they enjoyed as members of the worshipping public such as a hereditary right. 6 M. 151 : 23 M. 28 : 15 M. L. J. 458 : 4 L. W. 562 : 45 M. 113 Q. B. referred to.

C. Narasimhachari for Appellant.

T. R. Ramachandra Aiyar and *N. Chandrasekhara Aiyar* for Respondent.

N. S.

Ramesam and Wallace, JJ.
24th November, 1926. } S. A. No. 1886 of 1923.

Civil Procedure Code, S. 73—Where assets become realised in execution—Perishable property attached before judgment and

sold—Subsequent decree and execution—Order on the petition, necessity of.

X and Y two creditors obtained attachment before judgment of certain movable property which was sold as it was perishable and the sale proceeds were deposited to the credit of X's suit. X obtained decree afterwards and put in an execution petition. But after X's decree but prior to the order on execution petition Y also obtained decree and put in an execution petition in his own suit. The Lower Courts allowed X to draw the whole amount as X was the first to obtain the decree and put in his execution application.

Held, in second appeal that the putting in of an execution petition by itself will not make the assets as realised in execution of X's decree and that till an order was made on that it cannot be deemed to be so. The test laid down by Wallace, J. in 46 Mad. 506 L. P. A. applied.

S. Rangaswami Aiyengar for Appellant.

R. Visvanathan and *A. Srinivasan* for Respondent.

N. S.

Ramesam and Wallace, JJ.
24th November, 1926.

S. A. No. 1118 of 1923.

Contract Act, S. 74—Penalty—Compound interest at a higher rate—Compensation.

Where a mortgage bond stipulated for a higher rate of compound interest in case of default in payment of principal and interest on the due date, the stipulation is by way of penalty and can be relieved against. But the Court must award some compensation over and above the original rate.

A. N. Krishna Aiyengar for Appellant.

V. Ramaswami Aiyar for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ.
25th November, 1926.

A. S. No. 1 of 1926.

Civil Procedure Code, O. 1, R. 10 (5)—Limitation Act, S. 22—Petition to implead a party as defendant—Order impleading him as party—Whether relates back to the date of the application.

A petition was put in to implead a person as a party to a suit and it was ordered. But on review this order was cancelled and the petition was dismissed. Against the order granting the review a Civil Revision Petition was filed in the High Court and it was allowed with the result that the lower Court was directed to add him as a party and proceed with the suit. The lower Court held that the suit as against this added defendant must be taken to have been instituted only on the date when the summons was served upon him and so dismissed the suit as it was barred by limitation on that date. The plaintiff preferred an appeal.

Held, that the order passed by the High Court on the C. R. P. must be taken to have been the order passed by the Lower Court

on the petition and that it would relate back to the date of presentation of the petition and that as the claim was not barred on that date the suit was not barred as against him. 17 B. 29 followed. 33 M. 115 referred. 21 L. W. 125 and 1926 M. W. N. 592 P. C. distinguished.

K. P. Raman Menon for Appellant.

T. R. Ramachandra Aiyar and *T. Ramachandra Rao* for Respondent.

N. S.

Krishnan, J.
26th November, 1926.
C. M. S. A. No. 70 of 1925 and C. R. P. No. 851 of 1925.

Civil Procedure Code, S. 104 *and O.* 43, *R.* (1) (*j*)—*Order under O.* 21, *R.* 89—*Appeal—Second appeal or Revision to the High Court—Decree-holder privately purchasing properties of the judgment-debtor but not entering up satisfaction—Court sale—Purchase by stranger at the auction—Application by decree-holder under O.* 21, *R.* 89 *to set aside the Court sale—Estoppel.*

The decree-holder in a mortgage suit applied for execution. Before the sale in execution, the decree-holder purchased the properties privately but did not bring it to the notice of the Court. The execution proceedings were not stopped and the properties were sold in Court auction and purchased by a stranger. The decree-holder subsequently put in a petition under O. 21, R. 89 to set aside the Court sale. The District Munsif set it aside but on appeal the District Judge reversed it and dismissed the petition. Against this a second appeal and a revision petition were filed.

Held, (1) that second appeal did not lie, as S. 104 (2) read with O. 43, R. 1, Cl. (j) showed that the order on the appeal was final.

(2) That a revision would lie 44 M. 554 Q. B. followed.

(3) The decree-holder was not estopped from applying under O. 21, R. 89 simply because he was careless in not bringing the fact of the satisfaction of his decree to the notice of the Court. 2 P. 720 followed, 15 L. W. 272 distinguished.

W. Kothandaramiah for Appellant.

V. S. Narasimhachari for Respondent.

N. S.

Waller and Madhavan Nair, JJ.
26th November, 1926.

L. P. A. No. 210 of 1925.

Limitation Act, Art. 144—*Adverse possession—Usufructuary mortgage of service inam lands—Subsequent sale of the same lands—Subsequent enfranchisement in favour of the office-holder—Suit by office-holder for recovery of the lands—Limitation—Plaintiff whether bound consideration of the sale amount to the defendant.*

The holder of the office of Karnam gave a usufructuary mortgage of the service Inam lands in 1907 for Rs. 700 to the father of defendants and put the defendants in possession. In 1910 a sale-deed was executed for the same lands in favour of defendant's father for Rs. 1,500 comprising of Rs. 700 the mortgage amount and Rs. 800 cash. The lands were enfranchised in 1911 in favour of the office-holder. The office-holder filed a suit in 1920 for recovering the lands from the defendants.

Held :—As the mortgage of 1907 was discharged by the sale of 1910 adverse possession cannot be counted from 1907 and the adverse possession of defendants was not perfected within 12 years from the date of sale.

(2) As the transaction was void in law plaintiff is bound to refund to the defendants Rs. 1,500. 50 I. A. 69 followed.

K. Bhimasankaram for Petitioner.

B. Satyanarayana for Appellant.

Y. Suryanarayana for Respondents.

N. S.

Odgers, J.
26th November, 1926.

S. A. No. 1043 of 1923.

Madras Estates Land Act, S. 3 (4), *Rent Sale of Enfranchised Reddi Inam for arrears of Jodi payable to Zemindar—Whether passes title to purchaser.*

A Reddi inam was enfranchised by Government and ayan patta issued to the inamdar. The inam had been excluded from the assets of the Zemindari at the time of settling the peishcust. The inam was sold for arrears of Jodi due to the Zemindar under the provisions of the Estates Land Act.

Held, that Jodi was not "rent" within the meaning of the Estates Land Act, that the mere payment of Jodi to the Zemindar did not establish the relation of land-holder and ryot between the Zemindar and inamdar and that the rent sale was therefore invalid and passed no title to the purchaser.

E. Krishnamurthi for Appellant.

N. Chandrasekhara Aiyar for Respondent.

N. S.

N R C

Ramesam and Wallace, JJ. }
29th November, 1926. } S. A. No. 243 of 1924.

Limitation Act, Ss. 9 *and* 14—*Suit on promissory note—Previous suit for declaration that pronote was unenforceable and for its cancellation—Cause of action whether suspended.*

The maker of a promissory note instituted a suit against the payee for a declaration that the promissory was unenforceable as it was brought about by fraud undue influence and for its cancellation. The suit was dismissed finally by the appellate court. Subsequently the payee of the note instituted a suit to recover the amount due on the note. He wanted to deduct the time taken during the pendency of the proceedings in the prior suit. *Held* that the time cannot be suspended and that apart from specific Sections of the Limitation Act allowing exemptions no other exemption could be claimed. 43 C. 660 P. C. followed.

V. Suryanarayana for Appellant.

K. Venkatrama Raju for Respondent.

N. S.

Chief Justice and Srinivasa Iyer, JJ. }
29th November, 1926. } Crl. Rev. Case. No. 556 of 1926.

Madras Local Boards Act (*XIV of* 1920)—*Sch. VII* (*K*) *and Ss.* 193 *and* 207—*Stall where coffee and sweets are sold whether a coffee-house or a restaurant—Necessity for license.*

A stall where coffee is prepared and sold together with sweets, is not a coffee-house or a restaurant within the meaning of Sch. VII, Cl. (K) of the Madras Local Boards Act and it is unnecessary to obtain a license for the same under S. 193 of the Local Boards Act and the conviction of the accused for keeping such a stall without a license, under S. 207 of the Local Boards Act is illegal and ought to be set aside.

P. S. Narayanaswami Iyer for Petitioner.

The Acting Public Prosecutor R. N. Aiyengar for Crown.

N. S.

Curgenven, J. }
30th November, 1926. } S. A. No. 722 of 1924.

Transfer of Property Act, S. 53—*Suit under—Whether should be a representative suit—Point not raised in the lower courts—Whether can be raised in second appeal.*

The plaintiffs mortgagees from the first defendant instituted a suit for setting aside a sale-deed executed by him to the second defendant a few days prior to his mortgage on the ground that the sale was not supported by consideration and was in fraud of creditors. The second defendant, *inter alia*, pleaded that the suit brought individually in the plaintiff's name was not maintainable, and that the suit must be framed as one in a representative capacity on behalf of all the creditors. The trial Court over-ruled this plea and on the merits decreed the suit. On an appeal by the second defendant, the plea of maintainability of

the suit was not taken and the Appellate Court also dismissed the appeal. *Held* that the point as regards the maintainability of the suit ought not to be allowed to be raised in second appeal, the same having been waived before the lower appellate Court; though questions of law or of Jurisdiction might be taken for the first time in second appeal, the present case would not come within that rule, as the rule requiring the suit to be brought in a representative capacity is one for the protection of the interest of the alienee who ought not to be harassed by a number of suits instituted by individual creditors.

A representative suit should conform to the provisions of Order 1, Rule 8, Civil Procedure Code. A mere averment in the plaint by the plaintiff that he and other creditors are sought to be defrauded will not do.

K. Kameswara Rao for Appellant.

The Hon'ble Mr. V. Ramadas for Respondent.

N. S.

Waller and Madhavan Nair, JJ. *1st December*, 1926. — C. N. A. No. 419 of 1924 and S. A. No. 742 of 1925.

Civil Procedure Code (Act V of 1908)—O. 22, Rr. 9 *and* 11—*Abatement—One of several joint decree-holders not brought on record—Whole appeal abates.*

Where after the appeal was preferred one of the respondents-decree-holders died and his legal representative was not brought on record and a decree was passed by the appellate court. *Held* that as the appeal had abated as against one of the joint-decree-holders, the whole appeal would abate.

G. Ramakrishna Aiyar, Vakil for Appellant.

B. Somayya, Vakil for Respondent.

N. S.

Waller and Madhavan Nair, JJ. *1st December*, 1926. — L. P. A. No. 140 of 1925.

Inam—Grant of, in favour of the grantee, his assigns and representatives—Grantee dead before the inam deed drawn up—Right of legal representative.

One Venkataraju, the Karnam of a village was enjoying a portion of service Inam lands and died in February 1906. Three Inam title-deeds for the service lands were signed by the Inam Commissioner in June 1906 and 1907, in favour of Venkataraju and 6 others. The enfranchisement took effect from 1911. The title-deeds conferred title to "you your representatives and assigns." A suit was filed by Venkataraju's heirs to recover the service Inam lands enjoyed by him in his life time.

Held :—The title-deeds do not confer any right on Venkataraju as he died long before they were signed by the Inam Commissioner.

(2) A grant to "you your representatives and assigns" means an absolute estate to you but does not confer a right on the representatives and assigns as they are words of limitation and not of purchase. 45 All. 595 P. C,

(3) Board Standing Order 52, Cl. (2) applies to cases where the grantee was alive at the date of signing of the title-deed by the Inam Commissioner but died before the date of delivery of title deed to him and has no application to the facts of the present case.

The decision of Phillips, J. in section 1574/22, reported at 49 M. L. J. 547, reversed.

Y. Suryanarayana for Appellant.

C. Rama Rao for Respondent.

N. S.

Devadoss, J.
1st December, 1926. } S. A. No. 295 of 1924.

Evidence Act (I of 1872)—S. 92—Property purchased by father in the joint names of two sons—Document silent as to how the property is to be taken by the vendees—Evidence as to father's intention—Admissibility as between the co-vendees.

Where a father purchased properties in the joint names of his two minor children and for their benefit with the intention that they should separately take specific properties and where the sale-deed was silent as to how the property should be taken, evidence is admissible to show, in a dispute between the vendees, the father's intention by proof of his acts and conduct both prior and subsequent to the registration of the deed. Sec. 92 of the Evidence Act is no bar to the reception of such evidence as between the co-vendees, since it applies only between the parties who, on one side and on the other, come together to make the contract. I. L. R. 10 All. 421 followed.

G. Lakshmanna and *K. Kameswara Rao* for Appellant.

S. Varadachariar for Respondent.

N. S.

Wallace, J.
2nd December, 1926. } C. R. P. No. 236 of 1926.

Civil Procedure Code, O. 5, R. 20 and O. 9, R. 13 and S. 115—Defendant served by substituted service—Application to set aside the ex parte *decree—Court whether can go into the sufficiency or validity of substituted service—Limitation—Limitation Act, Art. 164—Revision.*

In an application to set aside the *ex parte* decree passed against a defendant who was served by substituted service and was *ex parte* at the time of hearing, the court cannot go into the validity or sufficiency of the substituted service. Substituted service is due service for the purpose of Article 164 of the Limitation Act.

N. Sivaramakrishna Aiyar for Petitioner.

A. Krishnasami Aiyar for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ.
3rd December, 1926. } A. S. Nos. 155 and 208 of 1923.

Hindu Law—Adoption by widow—Consent by son—Suit by reversioner to set aside adoption—Limitation—Limitation Act, Art, 118,

The following questions were referred to a Full Bench :—

(1) Whether an adoption made by a Hindu widow with the authority of her son given under his will is valid if it was not objected to by the then nearest reversioner.

(2) Where the immediate reversioner at the time of the adoption was a major and died before a suit for a declaration that the adoption was not valid was barred, what is the period of limitation for a suit by the next reversioner who was a minor on the date of the adoption for the same relief.

S. Varadachariar for Appellant.

A. Krishnasami Aiyar for Respondent.

N. S.

Ramesam and Madhavan Nair, JJ.
3rd December, 1926. } C. M. A. No. 375 of 1925.

Provincial Insolvency Act (1920), S. 10—Dismissal of prior application for insolvency by debtor for default—Whether bars subsequent application—Civil Procedure Code, O. 9, R. 9—Whether applicable.

A dismissal of a prior insolvency application by a debtor for default does not bar a subsequent application by him for adjudication as an insolvent. Followed.

E. Krishnamurthi for *B. Somayya* for Appellant.

R. Srinivasa Aiyangar for Respondent.

N. S.

Krishnan and Odgers, JJ.
6th December, 1926. } A. S. No. 42 of 1925.

Hindu Law—Joint family—Illegitimate daughter of a deceased member of the family—Right to claim maintenance from the joint family.

Though illegitimate sons are entitled under Hindu law to claim maintenance from the surviving co-parceners out of the joint family properties, illegitimate daughters are not so entitled, as they cannot be regarded as members of their father's family. Case law on the subject reviewed.

A. Krishnasami Aiyar for Appellant.

K. S. Krishnasami Aiyangar for Respondent.

N. S.

Devadoss, J.
7th December, 1926. } S. A. No. 449 of 1924.

Limitation Act, Art. 61—Agreement by lessee to assign lease—Failure to execute deed—Suit for specific performance—Decree—Execution of assignment deed—Suit by for recovery of amounts paid to lessor—Limitation.

A lessee entered into an agreement to transfer the lease obtained by him in favour of another person and placed him in possession. But

he failed to execute a duly registered deed of assignment and a suit for specific performance was brought and decreed in the first court and confirmed by the High Court in second appeal: The lessee executed the assignment deed pursuant to the decree and instituted the present suit for recovery of the amounts paid by him to his original lessors by way of Poruppu and other dues, during the period of the litigation,

Held, (1) the suit was barred so far as the recover of amounts paid more than 3 years prior to the suit was concerned,

(2) that the cause of action cannot be said to arise from the execution of the deed of assignment,

(3) that the proper article applicable was article 61 and the cause of action accrued on the date of the decree of the first court directing specific performance.

S. *Varadachariar* and *G. Rajagopalan* for Appellants.

K. Rajah Iyer and *V. Ramaswami Iyer* for Respondents.

N. S.

Waller, J.

7th December, 1926.

C. C. A. No. 65 of 1925.

Master and servant—Government servant on leave under the Rules—Acceptance of private service contrary to the Rules in anticipation of getting permission—Subsequent application for permission—Refusal of permission—Continuance in private service for one year afterwards—Subsequent dismissal from service—Right of Government to recover the leave allowance drawn by the servant.

On 3rd January 1921 a Government servant who was on leave took up private service without getting the permission of the Government as per the Government Rules but in anticipation of getting permission. He sent his application for permission on 16th January 1921 but the same was refused on 10th March 1921. But he continued in private service even after that and while so continuing drew his leave allowance till 31st July 1922. The Government called for an explanation in August 1922 and dismissed him from service on 26th October 1922. The Government brought a suit to recover from him the leave allowance drawn by him from 3rd January 1921 to 31st July 1922 on the ground that it was paid to him under a mistake of fact.

Held, (1) as Rule 52 of the Government Rules said that the "pay and allowances of an officer dismissed from service cease from the date of dismissal," the allowances drawn by the officer before the date of dismissal could not be recovered,

(2) the amount could not be recovered under the general law of master and servant as it was not paid under any mistake of fact. 1904 (1) Ch. 276 distinguished.

K. V. Krishnasami Aiyar and *T. K. Rangasami Aiyar* for Appellant.

The Government Pleader for Respondent.

N. S.

Madhavan Nair, J.
7th December, 1926. } C. R. P. No. 753 of 1926.

Civil Procedure Code, O. 9, *R.* 13—*Defendant served by substituted service under O.* 5, *R.* 20—Ex parte *decree—Application to set aside* ex parte *decree—Limitation Act, Art.* 164—"*Summons duly served*"—*Meaning of.*

Where a defendant is served by substituted service, it cannot be said that the summons is not duly served within the meaning of Article 164 of the Limitation Act. Consequently the period of limitation for setting aside the *ex parte* decree in such a case is 30 days from the date of the decree and not from the date when the defendant had knowledge of the decree. 7 L. L. J. 448 followed.

In an application to set aside an *ex parte* decree, the onus of proving that the summons was not duly served is upon the defendant and if he does not adduce any evidence the application must be dismissed.

N. Swaminathan for Petitioner.

K. G. Srinivasan for Respondent.

N. S.

The Chief Justice and
Srinivasa Aiyangar, J.
8th December, 1926. } O. S. A. No. 24 of 1926.

Presidency Towns Insolvency Act, S. 116 (2)—"*Order having been duly made*"—*Meaning of—Order of adjudication based on decision with regard to a particular act of insolvency—Whether a judgment* in rem *so as to bind persons who were not parties to the order.*

Though an order of adjudication is based on a decision with regard to a particular act of insolvency, the adjudication is not a judgment *in rem* as regards the commission of the particular act of insolvency and does not bind persons who were not parties to that order. 37 Times Law Reports 748, 10 Ch. D. 3, 12 Ch. D. 30 distinquished.

Under S. 116 (2) the order of adjudication is conclusive evidence only of the order having been duly made and *not* of the ground of the decision.

S. Duraisami Aiyar for Appellant.

N. S.

Beasley, J.
9th December, 1926. } O. P. No. 188 of 1926.

Companies Act, S. 38—"*Omitted*"—*Meaning of—Share-holder removed by the resolution of directions—Remedy.*

The word "omitted" in S. 38 of the Companies Act does not include "removed". Consequently the remedy of a share-holder removed by resolution of directors is not an application under S. 38 but a regular suit.

D. Ramaswami Aiyangar for Petitioner.

K. Aravamadu Aiyangar for Counter-Petitioner.

N. S.

Madhavan Nair, J.
9th December, 1926. } C. R. P. No. 1063 of 1925.

Civil Procedure Code, Sch. II, R. 1—Suit for dissolution of partnership—One of the defendants given up—Award passed without his concurrence in the reference to arbitration—Validity.

In a suit for dissolution of partnership between plaintiff and defendants 1—4 in the course of trial the 4th defendant was given up by the plaintiff. Later there was a reference to arbitration to three arbitrators without the 4th defendant being a party to the reference. The 4th defendant later appeared as a witness on one occasion before the arbitrators on behalf of one of the defendants. The arbitrators made an award defining the rights of the 4th defendant also. Objection was taken to the validity of the award,

Held, that Schedule II, Rule 1, Civil Procedure Code requires the concurrence of all the parties interested in a reference to arbitration and that the award passed in the absence of the 4th defendant was invalid as one made without jurisdiction. 48 M. L. J. 142, followed.

B. Somayya for Petitioner.

B. C. Sankaranarayana and *E. Krishnamurthi* for Respondents.

N. S.

Waller, J.
10th December, 1926. } C. C. C. A. Nos. 8 and 9 of 1925.

Madras City Municipal Act (1919), *Ss.* 287, 288 *and* 365 (2)—*Electricity Act and Tramways Act—Conflict between—Which prevails—Liability of Electric Supply Corporation and Electric Tramway Company to pay license fees.*

The Madras Electric Supply Corporation and Madras Electric Tramway Company who have got permission to carry on the works that may fall under Ss. 287 and 288 of the Madras City Municipal Act, under the Electricity Act and Tramways Act which are Imperial Acts are not bound to obtain licenses under Ss. 287 and 288 by paying license fees under S. 365 (2) of the Madras City Municipal Act, as the provisions of the latter Act being inconsistent with the provisions of the Imperial Acts referred to above cannot over-ride them. 34 B. 252 followed.

S. Rangasami Aiyangar for Appellant.

Nugent Grant for Respondent.

N. S.

[END OF VOLUME LI.]